No. 09-1

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ATHENS DISPOSAL COMPANY, INC.
dba ATHENS SERVICES,

Petitioner,

v.

EDIXON FRANCO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has granted review on the question whether, consistent with the Federal Arbitration Act, courts may impose class arbitration as to parties whose arbitration clauses are silent on that issue. *Stolt-Nielsen, et al. v. Animalfeeds, International Corporation*, No. 08-01198.

This case presents the following closely related and equally important issue:

Whether the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, prohibits a court from invalidating an express class action bar in an arbitration agreement because the court finds that class arbitration is more efficient, where the class action bar does not preclude the plaintiff from vindicating his statutory rights through an individual arbitration.

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the California Court of Appeal and California Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner Athens Disposal Company, Inc. dba Athens Services states that it has no parent company and no publicly held company owns 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
Statutory Background of the FAA	9
Factual Background	14

TABLE OF CITED AUTHORITIES

Page

REASONS FOR GRANTING THE PETITION .. 17

The Decision Below Reveals the Deep Conflict in the Lower Courts as to Whether Refusing to Enforce the Parties' Arbitration Agreement Because It Contains a Class Action Waiver Violates the Federal Arbitration Act. 20

The Decision Below Conflicts With This Court's Decisions 24

The Question Presented Is Vitally Important 26

An Important Similar Issue Is Already Pending Before This Court 27

This Case Presents An Appropriate Vehicle for Resolving the Conflict Among the Federal and State Courts. 28

The Erroneous *Gentry* View Must Be Corrected 29

CONCLUSION 32

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Court Of Appeal Of The State Of California, Second Appellate District, Division One Filed March 10, 2009 As Modified On March 18, 2009 ..... 1a

Appendix B — Order Of The Superior Court Of The State Of California, County Of Los Angeles Dated And Filed December 6, 2007 ..... 43a

Appendix C — Order Of The Superior Court Of The State Of California, County Of Los Angeles Dated And Filed August 20, 2007 ... 47a

Appendix D — Order Of The Supreme Court Of California Denying Petition For Review Filed June 17, 2009 ..... 49a

TABLE OF CITED AUTHORITIES

Page

Cases

14 Penn Plaza LLC v. Pyett,
556 U.S. __, 129 S. Ct. 1456 (2009) 9, 10

Adkins v. Labor Ready, Inc.,
303 F.3d 496 (4th Cir. 2002) 12

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 10

Caley v. Gulfstream Aerospace Corp.,
428 F.3d 1359 (11th Cir. 2005) 11, 22, 23

Carter v. Countrywide Credit Industries, Inc.,
362 F.3d 294 (5th Cir. 2004) 11, 22

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) 9, 10

Delta Funding Corp. v. Harris,
466 F.3d 273 (3d Cir. 2006) 12

Discover Bank v. Superior Court,
36 Cal. 4th 148 (2005) 5

Dominion Austin Partners, L.L.C. v. M.J. Emerson,
248 F.3d 720 (8th Cir. 2001) 12

Cited Authorities

Page

Franco v. Athens Disposal Co., Inc.,
171 Cal. App. 4th 1277 (2009) 1, 6, 19, 28

Gentry v. Superior Court,
42 Cal. 4th 443 (2007), *cert. denied*, __ U.S. __, 128 S.Ct. 1743 (2008) ..... *passim*

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) ..... *passim*

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 10, 30

Green Tree Financial Corp.—Alabama v. Randolph,
531 U.S. 79 (2000) 7, 19, 24

Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,
379 F.3d 159 (5th Cir. 2004) 12, 23

In re American Express Merchants' Litigation,
554 F.3d 300 (2nd Cir. 2009) 13

In re Cotton Yarn Antitrust Litigation,
505 F.3d 274 (4th Cir. 2007) 12

Ingle v. Circuit City Stores, Inc.,
328 F.3d 1165 (9th Cir. 2003) 12, 21

Cited Authorities

Page

Jenkins v. First American Cash Advance of Georgia, LLC,
400 F.3d 868 (11th Cir. 2005) 12

Johnson v. West Suburban Bank,
225 F.3d 366 (3d. Cir. 2000), *cert. denied*,
531 U.S. 1145 (2001) 12, 21, 22, 23

Kuehner v. Dickinson & Co.,
84 F.3d 316 (9th Cir. 1996) 12

Livingston v. Assocs. Fin., Inc.,
339 F.3d 553 (7th Cir. 2003) 12

Lloyd v. MBNA Am. Bank, N.A.,
27 Fed. Appx. 82 (3d Cir. 2002) 12

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 10, 31

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 9, 10, 24

Moses H. Cone Hospital v. Mercury Constr.,
460 U.S. 1 (1983) 7, 19, 25

Murphy v. Check 'N Go of California, Inc.,
156 Cal. App. 4th 138 (2007) 6

Cited Authorities

Page

Olvera v. El Pollo Loco, Inc.,
173 Cal. App. 4th 447 (2009) 6

Perry v. Thomas,
482 U.S. 483 (1987) 8, 11, 30

Preston v. Ferrer,
552 U.S. __, 128 S. Ct. __, 169 L. Ed. 2d 917
(2008) 9, 10, 11, 30, 31

Randolph v. Green Tree Fin. Corp. – Alabama,
244 F.3d 814 (11th Cir. 2001) 12, 22, 23, 24, 25

Sanchez v. Western Pizza,
172 Cal. App. 4th 154 (2009) 6

Schroyer v. New Cingular Wireless Services, Inc.,
498 F.3d 976 (9th Cir. 2007) 12

Skirchak v. Dynamics Research Corp.,
508 F.3d 49 (1st Cir. 2007) 13

Snowden v. CheckPoint Check Cashing,
290 F.3d 631 (4th Cir. 2002) 12, 23

Southland Corp. v. Keating,
465 U.S. 1 (1985) 10, 26, 30

Page

Stolt-Nielsen, S.A. et al. v. Animalfeeds, International Corp., No. 08-1198 ..... i, 3, 27, 28

Szetla v. Discover Bank, 97 Cal. 4th 1094 (2002) 21

Thomas v. Perry, 200 Cal. App. 3d 510 (1988) 30

Ting v. AT & T, 319 F.3d 1126 (9th Cir. 2003) 13

Volt Info. Scis. Inc. v. Board of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468 (1989) 9, 10, 11, 31

Statutes

28 U.S.C. § 1257(a) 1

Federal Arbitration Act, 9 U.S.C. § 2 ..... 2, 9

Federal Arbitration Act, 9 U.S.C. § 4 18

Federal Arbitration Act, 9 U.S.C. §§ 1-16 i

Labor Code section 1194 23

Labor Code section 203 23

Page

Labor Code section 218.5 23

Labor Code section 229 ..... 8, 11

Labor Code section 2699 23

Other Authorities

Ramona L. Lampley, "Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape", 18 *Cornell J. L. & Pub. Policy* 477 (2009) 20

PETITION FOR A WRIT OF CERTIORARI

Petitioner Athens Disposal Company, Inc. dba Athens Services (herein "Athens") respectfully petitions for a writ of certiorari to review the judgment and opinion of the Court of Appeal of California, Second Appellate District, Division One, filed on March 10, 2009 and modified on March 18, 2009.

OPINIONS BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division One, reported in *Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277, 90 Cal. Rptr. 3d 539 (2009), is reprinted in the Appendix A at 1a-42a. The summary orders of the Court of Appeal denying rehearing, and the California Supreme Court denying Athens' petition for review, Appendix D at 49a, are unreported. The Los Angeles Superior Court Order compelling arbitration following reconsideration, Appendix B at 43a-46a, is unreported. The original Los Angeles Superior Court Order compelling arbitration, Appendix C at 47a-48a, is unreported.

JURISDICTION

The opinion of the California Court of Appeal was entered on March 10, 2009, and was modified on March 18, 2009. Appendix A at 1a. The Court of Appeal denied a timely petition for rehearing on April 1, 2009. Athens timely filed a petition for review before the California Supreme Court on April 20, 2009, which was denied on June 17, 2009. Appendix D at 49a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, clause ii, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 9, Section 2 of the United States Code provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This case presents the question whether the Federal Arbitration Act prohibits a court from invalidating an express class action bar in an arbitration agreement because the court finds that class arbitration is more efficient, where the class bar does not preclude the plaintiff from vindicating his statutory rights through individual arbitration. This Court has granted review on the question whether, consistent with the FAA, courts may impose class arbitration as to parties whose arbitration clauses are silent on that issue. *Stolt-Nielsen, S.A. et al. v. Animalfeeds, International Corp.*, No. 08-1198. The instant case presents the directly related question of whether the FAA permits courts to impose class-action procedures on arbitration where the parties' agreement expressly prohibits class arbitration.

The California Court of Appeal refused to enforce Athens' arbitration agreement, because it called for individual arbitration and prohibited class arbitration. The Court of Appeal instead ordered that the case be tried in a court of law on the grounds that the class arbitration waiver provision was not just separately unenforceable, but it purportedly tainted the entire arbitration agreement with illegality.

In its decision below, the Court of Appeal invalidated the parties' arbitration agreement, because it required individual arbitration and prohibited class arbitration. The Court of Appeal held that the individual arbitration requirement in Athens' agreement with its former

employee, Edixon Franco, was invalid because "class treatment would be more practical than individual actions", reasoning that, "It would not be efficient or fair to relegate these complaints to multiple trials." *Id.* 171 Cal. App. 4th at 1299, Appendix A at 32a. Further, because the individual arbitration provision of the arbitration agreement prohibited Franco from seeking civil penalties on behalf of other employees under California's Labor Code, the Court of Appeal concluded that the arbitration "agreement as a whole is tainted with illegality and is unenforceable." *Id.* 171 Cal. App. 4th at 1303, Appendix A at 40a-41a. Accordingly, the Court of Appeal reversed the trial court, which had found the arbitration agreement was not unconscionable. The Court of Appeal ordered that Athens' petition to compel arbitration should be denied and the case should proceed to trial in a court of law, instead of in arbitration.

Relying on the California Supreme Court's decision in *Gentry v. Superior Court*, 42 Cal. 4th 443, 463 (2007), *cert. denied*, __U.S. __, 128 S.Ct. 1743 (2008), the Court of Appeal concluded that "the class arbitration waiver is unconscionable with respect to the alleged violations of the meal and rest period laws given 'the modest size of the potential recovery, the potential for retaliation against members of the class, [and] the fact that absent class members may be ill informed of their rights." *Id.* 171 Cal. App. 4th at 1282, Appendix A at 2a.

In *Gentry* a sharply divided California Supreme Court held that in cases involving California overtime laws a trial court must invalidate a class action waiver in an arbitration agreement if it concludes "that a class

arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws." *Id.* 42 Cal. 4th at 463. The *Gentry* Court held that in making this determination the trial court must consider the following factors: "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime through individual arbitration." *Id.* 42 Cal. 4th at 463.

Gentry was a 4 to 3 decision with a strong dissent by Justices Baxter, Chin, and Corrigan, who found that the majority decision was contrary to the FAA and this Court's decisions interpreting it. The dissent noted that the *Gentry* majority did not find that the individual-arbitration requirement in the arbitration agreement met the test of an invalid "exculpatory" agreement where "it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of [persons] out of individually small sums of money." *Id.* 42 Cal. 4th at 475, *citing Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). The dissent explained that because the FAA's "strong policy that arbitration agreements are to be enforced as written, any . . . alteration should be employed only on a showing of the starkest necessity." The dissent reasoned: "Unless Gentry's contract to arbitrate individually constitutes a de facto waiver of *his own* statutory rights, he should not be allowed to

act contrary to his agreement, as a representative plaintiff." *Id.* 42 Cal. 4th at 478-479. The dissent found that the *Gentry* majority's standard for invalidating a class actions waiver—that class arbitration was "significantly more effective"—was contrary to the FAA's strong policy of enforcing arbitration agreements according to their terms unless they constitute an exculpatory provision.

The California Supreme Court majority in *Gentry* declined to adopt a *per se* rule prohibiting class waivers in arbitration in every case, stating: "We cannot say categorically that all class arbitration waivers in overtime cases are invalid." Instead, the majority instructed trial courts to engage in a factual inquiry to determine whether, in each case, a class action lawsuit or class arbitration would be "demonstrably superior to individual actions." *Id.* 42 Cal. 4th at 462. The *Gentry* dissent criticized this standard, because "superiority" of class treatment is required by California law to maintain any class action, and in effect the "superiority" standard necessarily invalidates individual arbitration requirements in arbitration agreements in any suit where a class action is alleged. *Id.* 42 Cal. 4th at 476 and n. 2.

As predicted by the dissent, since *Gentry* all published decisions involving wage and hour claims in California have invalidated class action waiver provisions in arbitration agreements. *Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138 (2007); *Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277 (2009); *Sanchez v. Western Pizza*, 172 Cal. App. 4th 154 (2009); *Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th

447 (2009). In practical effect the *Gentry* majority's "superiority" standard and its progeny impose a *per se* rule of invalidity on class action prohibitions in arbitration agreements.

Although the issue was squarely raised by Athens, the Court of Appeal's decision in this case failed to address the substantive law under the FAA which requires enforcement of an arbitration agreement in accordance with its terms even if arbitration is not the most "efficient" forum, as long as the litigant may effectively vindicate his or her statutory rights. *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 20 (1983) (relevant federal law under the FAA gives effect to the parties' arbitration agreement even if it might result in piecemeal litigation); *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79, 90 (2000) ("so long as a prospective litigant effectively may vindicate [his or her] statutory causes of action in the arbitral forum, the statute [FAA] serves its functions."). As discussed below, the vast majority of federal decisions under the FAA permit class action waivers in arbitration agreements. The Court of Appeal decision invalidating Athens' arbitration agreement is in conflict with and therefore preempted by the FAA and the majority of federal decisions thereunder.

The Court of Appeal's silence on the FAA preemption issue was undoubtedly based on the California Supreme Court's previous rejection of FAA preemption in *Gentry*. The *Gentry* court held that the FAA did not prohibit courts from invalidating individual-arbitration requirements where class actions are found to be "significantly more effective" in vindicating

statutory rights. *Id.*, 42 Cal. 4th at 465. The *Gentry* majority reasoned that the California Legislature placed effective enforcement of overtime and other wage and hour laws above the FAA policy favoring enforcement of arbitration agreements according to their terms. The *Gentry* majority even alluded to the California Legislature's hostility to arbitration: "Outright legislative hostility to arbitrating wage claims was manifested in Labor Code section 229", which was later found preempted by the FAA in *Perry v. Thomas*, 482 U.S. 483 (1987). *Id.*, 42 Cal. 4th at 465-466, n 5.

The trial court correctly determined that the FAA applied. Appendix B at 45a. That determination was not challenged by Franco on appeal. Appendix A at 4a. Athens raised the FAA preemption issue at each stage of the proceedings and preserved the issue on appeal (Athens Petition to Compel Arbitration filed June 22, 2007; Athens Notice of Hearing of Defendant's Petition to Compel Arbitration filed July 23, 2007; Order of Los Angeles Superior Court Granting Petition to Compel Arbitration filed August 20, 2007, Appendix C at 48a; Order of Los Angeles Superior Court Granting Petition to Compel Arbitration filed December 6, 2007, Appendix B at 45a; Athens Brief to California Court of Appeal filed November 17, 2008, page 37-43; Athens; Athens Petition for Review to the California Supreme Court filed April 20, 2009, pages 27-29). As the Court of Appeal noted: "Athens made a straightforward argument: Under the FAA, arbitration was mandatory." 171 Cal. App. 4th at 1284, Appendix A at 5a.

Statutory Background of the FAA

Section 2 of the FAA provides that arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, Congress's goal in enacting the FAA was to overcome deep-seated judicial hostility to arbitration and thereby to allow private parties to choose to resolve their disputes through arbitration rather than litigation. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 625 n. 14 (1985) ("[T]he [Federal Arbitration] Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate . . ."); *Volt Info. Scis. Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985); *14 Penn Plaza LLC v. Pyett*, 556 U.S. __, 129 S. Ct. 1456 (2009) ("reliance on any judicial decision similarly littered with *Wilko*'s overt hostility to the enforcement of arbitration agreements would be ill advised.").

The FAA permits parties to "'trade [] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors, supra*, 473 U.S. at 628). "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Preston v. Ferrer*, 552 U.S. __, 128 S. Ct. __, 169 L. Ed. 2d 917, 928 (2008) (quoting *Mitubishi Motors, supra*). Because judicial hostility to arbitration existed in both federal and state

courts, this Court has concluded that § 2 of the FAA applies both in state and federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12-15 (1985); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

Essential to Congress' goal of ensuring the enforcement of the parties' agreements to arbitrate is the principle that such agreements may not be rewritten by courts. Rather, state and federal courts must "'rigorously enforce' such agreements according to their terms." *Volt*, *supra*, 489 U.S. at 479 (quoting *Dean Witter*, *supra*, 470 U.S. at 221). This Court has repeatedly explained that "the central purpose of the Federal Arbitration Act [is] to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, *supra*, 489 U.S. at 479).

This Court has further explained that "[B]y agreeing to arbitrate a statutory claim a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Gilmer*, *supra*, 500 U.S. at 26; *Mitsubishi Motors*, *supra*, 473 U.S. 614 at 628; *14 Penn Plaza LLC v. Pyett*, 556 U.S. __, 129 S. Ct. 1456 (2009); *Preston v. Ferrer*, *supra*, 552 U.S. __, 169 L. Ed. 2d at 929.

The FAA preempts all state laws and judicial decisions that disfavor arbitration. *See e.g.*, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (South Carolina Supreme Court decision applying state law to require class action proceedings in arbitration preempted by

FAA, which required arbitrator to decide initially if the agreement was silent or instead prohibited class proceedings); *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (California Labor Code § 229, restricting arbitration of wage disputes, preempted and invalidated by FAA); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (California Franchise Investment Law, interpreted as requiring judicial forum and not permitting arbitration, was preempted and invalidated by FAA); *Preston v. Ferrer, supra*, 552 U.S. __,169 L. Ed. 2d 917 (California statute referring dispute initially to administrative agency prior to arbitration was preempted by FAA). Only if the result required under state law does not conflict with the result required by the FAA can preemption be avoided. *Volt , supra*, 489 U.S. at 477.

This Court has intimated and the vast majority of federal circuit courts have held that the FAA requires courts to enforce express prohibitions against class arbitration procedures when those prohibitions are contained in arbitration agreements, including agreements in the employment context. *See Gilmer v. Interstate/Johnson Lane Corp., supra*, 500 U.S. at 32 (federal statutory age discrimination claim subject to arbitration under the FAA "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator"); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir.2005) (finding class action waivers in employment arbitration agreements valid); *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (holding class action waiver in employment arbitration clause not unconscionable, and finding a waivable right to class action under the federal Fair Labor Standards Act

("FLSA"); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (arbitration clause waiving right to bring class action does not render clause unenforceable as to federal FLSA wage claims); *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 285 (4th Cir. 2007) (individual arbitration requirement creating inconvenience and extra expense is not unenforceable unless there is a showing that individual arbitration is prohibitively expensive); *Delta Funding Corp. v. Harris*, 466 F.3d 273, 274-275 (3d Cir. 2006); *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 877-878 (11th Cir. 2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Lloyd v. MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82 (3d. Cir. 2002); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp. – Alabama*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d. Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Dominion Austin Partners, L.L.C. v. M.J. Emerson*, 248 F.3d 720, 728-729 (8th Cir. 2001); *see Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (employee's agreement to arbitrate necessarily includes forfeiture of right to judicial procedures, including FLSA procedures for collective action, while retaining right to substantive relief provided by statute); *contra*, *Schroyer v. New Cingular Wireless Services, Inc.* 498 F.3d 976 (9th Cir. 2007) (consumer class action waiver was unconscionable under California law because of the small amount in controversy); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 (9th Cir. 2003) (class action waiver in employment contract was unconscionable);

Ting v. AT & T, 319 F.3d 1126, 1150 (9th Cir. 2003) (class arbitration waiver in contract for telephone services was unconscionable); *compare*, *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 62 and n. 9 (1st Cir. 2007) (noting conflict between Ninth Circuit and other circuits on enforceability of class action waivers, but not reaching the issue, because content, timing, and obscurity of waiver had the effect hiding the waiver and making it unconscionable); *In re American Express Merchants' Litigation*, 554 F.3d 300, 304 (2nd Cir. 2009) (noting debate about validity of class arbitration waivers generally, court did not decide issue, because it found that prohibitive cost of arbitrating individual claims in that case made class arbitration the only means to vindicate statutory rights).

Although the issue was raised by Athens at each stage of the proceedings, neither the Court of Appeal nor the California Supreme Court herein specifically addressed the FAA question in this case. But that is because the Court of Appeal decision relied upon *Gentry*, where the California Supreme Court expressly rejected the argument that the FAA prohibited the court from rewriting the parties' contract to require class arbitration. The California Supreme Court's *Gentry* rule (relied upon by the Court of Appeal herein), invalidates individual-arbitration requirements in arbitration agreements where class arbitration is found to be "significantly more effective" or "demonstrably superior" to individual arbitration and is directly contrary to the FAA authority discussed above. *Id.* 42 Cal. 4th at 462-463. As noted above, three justices in *Gentry* strongly dissented on the ground that the majority decision contravened the FAA. Thus, the Court

of Appeal's reliance on *Gentry*, to the exclusion of and contrary to federal law, squarely presents the issue of FAA preemption.

Factual Background

Petitioner Athens is a California corporation engaged in the business of trash removal, disposal and recycling. Respondent Franco was employed by Athens as a driver, operating a local commercial trash truck from May 23, 2005 until May 12, 2006.

During 2005, in connection with his employment with Athens, Franco signed an arbitration agreement which confirmed in writing his agreement to resolve all employment related claims or disputes over $7,500 in value exclusively through binding arbitration. Franco expressly agreed that arbitration would proceed under the terms of Athen's Mutual Arbitration Policy ("MAP") before American Arbitration Association ("AAA"), and that AAA's Employment Arbitration Rules would govern any arbitration proceeding. Those expressly incorporated Rules comport with all of the minimum protections required by California law for the vindication of statutory rights.

The sole limitation imposed by the MAP and Franco's arbitration agreement is procedural – they expressly limit the parties to the arbitration proceeding to the real parties in interest, and prohibit consolidation or aggregation of claims unless the parties to the arbitration expressly agree to such procedures. Franco's signed Employee Agreement to Arbitrate stated that "by agreeing to use arbitration to resolve

my dispute, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the MAP, and agree to forego any right to bring claims on a representative or class basis."

Notwithstanding his agreement to arbitrate, Franco filed a civil action in the trial court on April 9, 2007, alleging that the value of his individual wage and hour claims exceeded the $25,000 threshold for such jurisdiction.

Franco alleged violations of the California Labor Code, including claims for allegedly unpaid overtime wages due to "off the clock" work, statutory compensation for missed meal and rest periods, and civil penalties provided by the California Labor Code.

Athens responded to Franco's complaint by filing a petition to compel arbitration under the FAA on June 22, 2007. The trial court entered an order granting Athens' petition to compel arbitration on August 20, 2007. The trial court found that Franco had failed to prove any unconscionability and determined that his arbitration agreement permitted Franco to pursue all his statutory claims in arbitration, although the arbitrator would have to decide the extent of remedies available to Franco.

Ten days later, the California Supreme Court issued its decision in *Gentry v. Superior Court*, 42 Cal. 4th 433 (2007). *Gentry* decided for the first time under California law, that in at least some cases, class action waivers contained in employment arbitration agreements could be unconscionable as applied to putative class claims

for violation of California overtime laws. The *Gentry* decision identified a number of factors for trial courts to consider in determining whether or not a class action waiver in an arbitration agreement should be enforced in any particular overtime case. *Gentry*, 42 Cal. 4th at 463. Based on *Gentry*, Franco on September 4, 2007 moved the trial to reconsider its August 20, 2007 order.

The trial court on October 22, 2007 granted the motion for reconsideration, setting aside its August 20 order so that it could conduct the inquiry required by *Gentry*.

Franco submitted a supplemental opposition to Athen's petition to compel arbitration in which his attorney conceded that the estimated amount of Franco's individual claim was between $22,000 and $37,750, not including statutory attorneys' fees.

Athens filed supplemental papers addressing the *Gentry* issues showing that: (1) Franco and the entire putative class alleged were California Highway Patrol regulated commercial drivers who are and were exempt from California's overtime laws; (2) Athens' policies and practices complied with California law by requiring drivers to accurately record their actual hours worked using an electronic time clock system and by requiring drivers to take all legally mandated rest periods and meal periods each work day; (3) Athens monitored compliance with its policies and provided effective ways for a driver to report and correct any individualized circumstance in which his hours worked were inaccurately recorded or paid or where he had been prevented from taking a meal or rest break; and (4)

Athens' Mutual Arbitration Policy created a free and fair arbitral forum meeting all the minimum requirements of California law necessary for the vindication of statutory rights; and (5) Athens had a policy against retaliation for employee complaints.

On December 6, 2007 the trial court issued an order making the additional specific factual findings mandated by *Gentry*, found the class action waiver provision to be proper and valid, and once again granted Athens' petition to compel arbitration.

On March 10, 2009, the Court of Appeal issued a published decision in this case, reversing the trial court's December 6, 2007 order granting Athens's petition to compel arbitration. On March 18, 2009, the Court of Appeal issued a *sua sponte* order modifying its March 10, 2009 opinion. On March 23, 2009, Athens filed a petition for rehearing or, alternatively, modification. On April 1, 2009 the Court of Appeal issued an order denying Athen's petition. On April 20, 2009, Athens filed a petition for review with the California Supreme Court. On June 17, 2009 the California Supreme Court denied Athens petition for review.

REASONS FOR GRANTING THE PETITION

Review by this Court of the Court of Appeal decision is necessary to ensure the proper and uniform resolution of a recurring and important issue under the Federal Arbitration Act ("FAA") that has divided the lower courts. Specifically, the California courts and the Ninth Circuit decisions are in direct conflict with the decisions of the Third, Fourth, Fifth, Seventh, Eighth,

and Eleventh Circuits on the issue of whether arbitration agreements providing for individual arbitration rather than class arbitration are enforceable under the FAA. This case squarely presents the question of whether the FAA prohibits a court from modifying or invalidating an arbitration agreement which requires individual arbitration and precludes class arbitration, where the class action waiver does not amount to an exculpatory clause which would preclude the vindication of statutory rights, just because the court believes that class arbitration is "significantly more effective" or "demonstrably superior" to individual arbitration.

The clear majority of federal appeals courts that have addressed this question have held that the FAA requires that the parties' arbitration agreement be enforced according to its terms, unless the class action waiver amounts to an exculpatory clause which would preclude the vindication of statutory rights. This majority approach is in accord with the decisions of this Court that the FAA requires that arbitration agreements be enforced in accordance with their terms and not rewritten by the courts. The minority view of *Gentry* and the Ninth Circuit, followed by the Court of Appeal in this case, favors class actions over the parties' agreement to individual arbitration. The *Gentry* approach betrays the FAA's fundamental purpose that the parties' arbitration agreement will be enforced "in accordance with the terms thereof." 9 U.S.C. § 4

The *Gentry* view holds that the FAA does not prohibit a court from invalidating an arbitration agreement that bars class arbitration, where the court finds that class arbitration would be more efficient. Put

another way *Gentry* permits courts to frustrate private agreements to arbitrate by requiring that those agreements be modified or voided completely, as in this case, if they do not allow class arbitration where the court believes this is "demonstrably superior" or merely "more practical" than individual arbitration. *Gentry*, *supra*, 42 Cal. 4th at 443; *Franco*, *supra*, 171 Ca. App. 4th at 1299. That is not the proper test.

The *Gentry* view cannot be reconciled with this Court's decisions which make clear that concerns regarding efficiency and economy are subsidiary to enforcement of the parties' agreement according to its terms. *Moses H. Cone Hosptial v. Mercury Constr.*, 460 U.S. 1, 20 (1983) (piecemeal resolution of claims is not a basis for refusing to enforce an agreement to arbitrate); *Green Tree Financial Corp.—Alabama v.* Randolph, 531 U.S. 79, 90 (2000) (party claiming that arbitration procedures preclude the vindication of statutory rights bears the burden of proving such with more than speculation). Indeed, the *Gentry* approach exhibits the same judicial hostility to arbitration that the FAA was designed to combat.

Finally, the conflict created by *Gentry* and its progeny, including the instant case, is one of paramount importance, because without a uniform nationwide standard, the determination of whether class arbitration can be mandated by a court will turn on the happenstance of geography, rather than on the intent of the parties expressed in the terms of their arbitration agreements. A uniform body of federal law is vital because the same arbitration agreements often apply to nation-wide employers and other businesses.

The absence of a uniform national standard will foster geographic forum shopping and forum shopping between federal and state courts.

The Decision Below Reveals the Deep Conflict in the Lower Courts as to Whether Refusing to Enforce the Parties' Arbitration Agreement Because It Contains a Class Action Waiver Violates the Federal Arbitration Act.

The majority of federal appeals courts have reached the exact opposite conclusion than that of *Gentry* and its progeny and concluded that arbitration agreements barring class arbitration must be enforced in accordance with their terms. A conflict between the Ninth Circuit, which has adopted a rule similar to *Gentry*, and the other federal courts of appeals has developed and should be resolved.

As one commentator has observed: "With the exception of the California state courts and the federal courts in the Ninth Circuit, most courts have rejected the idea that binding individual arbitration is 'so one-sided and unfair' as to be unconscionable. In recent years, however, state courts and some federal courts have stricken arbitration agreements under the rhetoric of unconscionability. The popularity of the defense is catching on, particularly when intermingled or confused with the vindication-of-statutory rights defense." Ramona L. Lampley, "Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape", 18 *Cornell J. L. & Pub. Policy* 477, 491-492 (2009).

The Ninth Circuit in *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1177 (9th Cir. 2003) found that a prohibition of class action proceedings in an employment arbitration agreement was "manifestly and shockingly one-sided" and "substantively unconscionable", because it insulated the employer from class-wide arbitration with no corresponding benefit to the employees. The Ninth Circuit characterized class arbitration prohibitions as "harsh and unfair" to "those who could benefit from proceeding as a class and offensive to the policies underlying class actions, such as promoting 'judicial economy and streamlin[ing] the litigation processes in appropriate cases." *citing Szetla v. Discover Bank*, 97 Cal. 4th 1094, 1101-1102 (2002).

In contrast, the Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have held that an individual arbitration requirement in an arbitration agreement must be enforced in accordance with its terms under the FAA. These courts have rejected the notion that there is some unwaivable right to a class action as long as statutory rights may be vindicated by individual arbitrations. *Johnson v. West Suburban Bank*, 225 F.3d 366, 378 (3rd Cir. 2000), *cert denied*, 531 U.S. 1145 (2001).

This majority view relies on this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, *supra*, 500 U.S. at 32, where the Court stated,

> "But 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [Age Discrimination in Employment Act]

> provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."

Johnson, supra, 225 F.3d at 377. The *Johnson* court noted that "The ADEA actually provides for collective litigation." The court reasoned that if *Gilmer* allowed individual arbitration under the ADEA where the statute provided for collective actions, then individual arbitration was certainly allowable where the statute did not contain such a provision. *Ibid. Accord Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) ("we reject . . . Appellants' claim that their inability to proceed collectively deprives them of substantive rights under the FLSA. The Supreme court rejected similar arguments concerning the ADEA in *Gilmer* . . ."). Quoting *Gilmer* the Eleventh Circuit in *Randolph v. Green Tree Financial Corp.—Alabama*, 244 F.3d 814, 817 (11th Cir. 2001), explained that as long as the individual litigant may vindicate his statutory right in an individual arbitration a prohibition of class arbitration is fully enforceable under the FAA, even where the statute "is designed not only to address individual grievances, but also to further important social policies."

The majority view also relies on *Gilmer* for the proposition that "the fact that certain litigation devices may not be available in arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition', characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Caley v. Gulfstream Aerospace Corp.*, 428

F.3d 1359, 1378 (11th Cir. 2005), *quoting Gilmer*, 500 U.S. at 31. The *Caley* court reasoned that the arbitration agreement's "prohibition of class actions and discovery limitations are consistent with the goals of 'simplicity, informality, and expedition touted by the Supreme Court in *Gilmer*." *Ibid.* The Fifth Circuit in *Iberia Credit Bureau, Inc, v. Cingular Wireless*, 379 F.3d 159, 174 (5th Cir. 2004), adopted the same rationale, stating: "As the Supreme Court has explained, the fact that certain litigation devices may not be available in arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition." *citing Gilmer*, 500 U.S. at 31.

In reaching the conclusion that class arbitration prohibitions do not amount to unenforceable exculpatory clauses several courts have relied on the fact that many of the statutes involved provide for attorneys fees and/or statutory penalties to the prevailing plaintiff, and hence claims for individual damages are sustainable. *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph, supra*, 244 F.3d at 818 ("the public policy goals of TILA can be vindicated through arbitration, and the statute contains other incentives—statutory damages and attorneys fees-for bringing TILA claims."); *Johnson*, 225 F.3d at 373-374.

This is certainly the case here, where California law provides for statutory penalties and attorneys' fees for the prevailing plaintiff in overtime, meal period, and rest period cases. California Labor Code §§ 203, 218.5, 226.7, 1194, 2699. In the instant case Franco's counsel conceded that the amount of Franco's individual claim was between $22,000 and $37,750, excluding statutory attorneys' fees.

Hence, there is a sufficient amount in controversy to provide the incentive for Franco to vindicate his statutory rights, and there is no basis for a finding that the class arbitration prohibition acts as a de facto waiver of Franco's statutory rights.

The decision of the Court of Appeal herein, following the flawed *Gentry* rationale, deepens the well-developed and active conflict in the federal and state lower courts, and requires review by this Court to resolve this important and recurring issue and ensure that this Court's decisions regarding the FAA are followed. The three post-*Gentry* California Court of Appeal decisions cited above demonstrate that this is a recurring and active conflict.

The Decision Below Conflicts With This Court's Decisions

The Court of Appeal decision plainly conflicts with precedent of this Court. In *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79, 90 (2000), this Court reiterated the standard that "so long as a prospective litigant effectively may vindicate [his or her] statutory causes of action in the arbitral forum, the statute [FAA] serves its functions." *citing*, *Gilmer*, *supra*, 500 U.S. at 28, and *Mitsubishi*, *supra*, 473 U.S. at 637. This Court in *Randolph* rejected as too "speculative" and unsupported by record evidence the plaintiff's argument that large arbitration costs precluded the plaintiff from arbitrating her individual claim and vindicating her statutory rights. The Court held that "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable

for arbitration." *Id.* 531 U.S. at 522-523. The Court further held that "where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Ibid.*

The court below erred by not following this approach, which was required by the FAA. Franco bore the burden of proving that he could not vindicate his statutory rights through individual arbitration. He clearly failed to meet this burden. Given the concession that Franco's claim was valued at $22,000 to $37,000, exclusive of the attorneys' fees and costs to which he would be entitled if he prevailed, Franco did not come close to showing that the individual arbitration requirement in his arbitration agreement precluded him from effectively vindicating his statutory rights. Under the arbitration agreement, Athens pays all costs of arbitration other than a nominal filing fee. Any contention that Franco was unable to vindicate his statutory rights through individual arbitration is purely speculative and entirely unsupported by the evidence.

The *Gentry* view also ignores that the FAA is designed to allow parties to choose simplified individual-arbitration procedures rather than complicated class action procedures by mandating that courts enforce such agreements as written. This approach cannot be squared with this Court's decisions which make clear that concerns of judicial efficiency are subsidiary to enforcement of the parties' agreement according to its terms. In *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 20 (1983), this Court held that an arbitration

agreement must be enforced under the FAA even if this results in related disputes being resolved in different forums, "because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement." This Court explained:

> "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary*. The effect of the section is to create a federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the act." (emphasis added).

The *Gentry* approach, which favors state law class action procedures over enforcement of the parties agreement for individual arbitration, is thus directly at odds with the FAA and this Court's decisions interpreting it.

The Question Presented Is Vitally Important

Resolution of the federal statutory question presented by this case is of the utmost importance. Arbitration clauses are widespread and are used by a myriad of nationwide businesses. It is essential that there be clear, uniform rules as to whether and under what circumstances the parties' agreement to individual arbitration will be enforced or be subject to being judicially rewritten to require class arbitration. Conflict and confusion in the law promote inconsistency and unfairness and "encourage and reward forum shopping." *Southland*, *supra*, 465 U.S. at 15.

An Important Similar Issue Is Already Pending Before This Court

This Court has granted review on the question whether it is consistent with the FAA for courts to impose class arbitration procedures on parties whose arbitration clauses are silent on that issue. *Stolt-Nielsen, S.A. et al. v. Animalfeeds, International Corp.*, No. 08-1198.

This case presents the corollary important issue of whether the FAA permits courts to impose class arbitration procedures on parties, or refuse to enforce the arbitration agreement altogether, in cases where the parties' agreement expressly bars class arbitration based simply on a finding that class arbitration is "more effective."

Should the Court decide that it is inconsistent with the FAA for a court to impose class arbitration where an arbitration clause is silent on the subject, then it is likely that the Court would find that an express prohibition of class arbitration is fully enforceable under the FAA, where it does not act as an exculpatory clause preventing the vindication of statutory rights. Conversely, should the Court decide in *Stolt-Nielsen* that a silent arbitration agreement does not prohibit class arbitration under the FAA, then resolution of the issue presented in this case will become even more important in order to provide guidance on whether and under what circumstances agreements for individual arbitration will be enforced under the FAA.

This case presents a more compelling need for review by this Court than *Stolt-Nielsen*. Despite the Congressional mandate of the FAA, which requires courts to enforce arbitration agreements strictly according to their terms, California courts have consistently flouted the FAA, as exemplified by the Court of Appeal's decision here. Despite the parties' agreement to arbitrate on an individual basis with only the real parties in interest participating, the Court of Appeal imposed its own policy favoring class actions upon the parties and refused to enforce the arbitration agreement altogether. In so doing, the Court of Appeal undermined the letter and the spirit of the FAA, and that decision should be reversed.

This Case Presents An Appropriate Vehicle for Resolving the Conflict Among the Federal and State Courts.

This case presents an appropriate vehicle for resolving the question whether the FAA permits courts to mandate class arbitration in the face of express class action waivers. The clear holding of the Court of Appeal below was to follow the *Gentry* approach and overturn the individual arbitration requirement simply because "class treatment would be more practical than individual actions". *Franco*, 171 Cal. App. 4th at 1299, Appendix A at 32a.

The trial court found that the FAA was applicable, and no party challenged that finding at any stage of the proceedings. The Mutual Arbitration Policy incorporated into the parties' arbitration agreement expressly provided that the FAA applied, stating:

"The MAP shall be governed solely by the Federal Arbitration Act, ('FAA'), 9 U.S. C. § 1, *et seq.*" Athens raised FAA preemption at each stage of the proceedings and preserved the issue on appeal.

Furthermore, in the factual setting of this case, where Franco conceded his individual claim had an estimated value of $22,000 to $37,000, he would be entitled to attorneys' fees and costs if he prevailed, and Athens paid all costs of arbitration except for a nominal filing fee, this is not the type of case where the costs of individual litigation compared to the amount in controversy amount to a de facto waiver of statutory rights unless class treatment is allowed. Instead, in this case the Court of Appeal held that simply because class arbitration is "more effective" and "more practical" in vindicating statutory rights the individual arbitration requirement was invalid and the entire arbitration agreement was unenforceable. 171 Cal. App. 4th at 1297-1299, Appendix A at 29a-32a.

The decision below thus squarely presents the conflict among the lower state and federal courts of whether a state policy favoring class proceedings can outweigh the FAA's requirement that arbitration agreements be enforced in accordance with their terms. This case is an ideal candidate for resolving that well developed and persistent conflict.

The Erroneous *Gentry* View Must Be Corrected

The decision below, based on the *Gentry* view that a court's affinity for class procedures trumps the FAA's policy that arbitration agreements be enforced in

accordance with their terms, ignores the FAA and this Court's decisions interpreting it. The *Gentry* approach elevates the California state policy favoring class actions over the federal statute requiring enforcement of arbitration agreements. The *Gentry* approach allows state parochial concerns about efficiency of enforcement of state statutes to outweigh a federal statutory requirement of enforcing arbitration agreements in accordance with their terms.

Federal case law under the FAA constitutes a body of substantive law on the enforceability of arbitration agreements. *Southland*, *supra*, 465 U.S. at 12; *Perry*, *supra*, 482 U.S. at 489 ("The effect of the section [Section 2 of the FAA] is to create a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act."). The FAA and the case law interpreting it preempt and displace contrary state law restrictions, legislative or judicial. *Southland*, *supra*, 465 U.S. at 10; *Perry*, *supra*, 482 U.S. at 490 (California Labor Code § 229, restricting arbitration of wage disputes, preempted and invalidated by FAA);); *Preston v. Ferrer*, *supra*, 552 U.S. __, 169 L. Ed. 2d at 925 (California Talent Agencies Act requiring administrative proceeding before arbitration preempted by FAA. "The FAA's displacement of conflicting state law is 'now well established.'"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

Where the federal substantive law under the FAA has determined that a particular type of arbitration provision is enforceable, California courts cannot refuse to enforce such provisions, even if state law would require otherwise. *See Thomas v. Perry*, 200 Cal. App.

3d 510, 514-515 (1988) ("respondent's claim that the arbitration agreement is unenforceable cannot be sustained on the basis of such *state* law authorities . . . Rather we must determine whether the arbitration clause would be held unconscionable and unenforceable as a matter of *federal* law.").

Before reversing the trial court's order and refusing to enforce the arbitration agreement in its entirety, the Court of Appeal was required by the Supremacy Clause to consider and apply the body of substantive law under the FAA, including case law allowing class arbitration prohibitions as long as statutory rights may be vindicated in arbitration.

The FAA requires courts to enforce the parties agreement as written, even if the arbitration procedures differ from the procedures in court. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Mastrobuono*, *supra*, 514 U.S. at 66 ("Parties are generally free to structure their arbitration agreements as they see fit."); *Volt*, *supra*, 489 U.S. at 479. Therefore, the parties may "specify the rules under which that arbitration will be conducted." *Id.* "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Preston v. Ferrer*, *supra*, 169 L. Ed. 2d at 928. Requiring class procedures to resolve Franco's individual claim "would, at the least, hinder speedy resolution of the controversy." *Ibid.* This is a further reason that the FAA requires enforcement of the arbitration agreement as written.

The Court of Appeal decision herein was plainly wrong in failing to apply federal substantive law under the FAA and refusing to enforce the individual arbitration requirement in the arbitration agreement in accordance with its terms.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE FILED MARCH 10, 2009 AS MODIFIED ON MARCH 18, 2009

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION ONE

No. B203317

(Los Angeles County
Super. Ct. No. BC369201)

EDIXON FRANCO,

Plaintiff and Appellant,

v.

ATHENS DISPOSAL COMPANY, INC.,

Defendant and Respondent.

Plaintiff, a trash truck driver, filed this suit, denominated a class action, against his former employer, a private company. He alleged the employer had violated the Labor Code by, among other things, denying meal and rest periods. The employer responded with a petition to compel arbitration based on a written agreement with plaintiff. The agreement contained a provision waiving class arbitrations. It also precluded

an employee from acting in "a private attorney general capacity," which would bar plaintiff's enforcement of the Labor Code on behalf of other employees.

Plaintiff argued that the petition should be denied because the class arbitration waiver and the private attorney general prohibition were unconscionable. The trial court disagreed and granted the petition, effectively limiting the arbitration to *plaintiff's* claims.

We conclude that the class arbitration waiver is invalid with respect to the alleged violations of the meal and rest period laws given "the modest size of the potential individual recovery, the potential for retaliation against members of the class, [and] the fact that absent members of the class may be ill informed about their rights." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 463 (*Gentry*).) In addition, because the arbitration agreement prevents plaintiff from acting as a private attorney general, it conflicts with the Labor Code Private Attorneys General Act of 2004 (PAGA) (§§ 2698-2699.5)-an act that furthers *Gentry's* goal of comprehensively enforcing state labor laws through statutory sanctions (see *Gentry*, *supra*, 42 Cal.4th at pp. 462-463).

Thus, the arbitration agreement is invalid in more than one respect and is unenforceable in its entirety. We conclude that the case should be tried in a court of law.

Appendix A

I

BACKGROUND

The allegations, facts, and evidence on appeal are drawn from the complaint and the papers filed in connection with the petition to compel arbitration.

A. The Complaint

On April 9, 2007, plaintiff Edixon Franco filed a class action complaint against Athens Disposal Company, Inc. (Athens), alleging as follows. Franco had been employed by Athens as a nonexempt, hourly employee until he left the company. He brought this suit individually and on behalf of other similarly situated current and former employees. The potential class is significant in size such that individual joinder would be impractical. Athens engaged in a systematic course of illegal payroll practices and policies in violation of the Labor Code and the Business and Professions Code. Athens subjected all of its hourly employees to the identical violations.

The first cause of action alleges that Athens violated Labor Code sections 510 and 1194 by failing to pay overtime. (All statutory references are to the Labor Code unless otherwise indicated.) In the second cause of action, Franco alleges that Athens violated section 226.7 and the applicable Industrial Welfare Commission wage order, No. 9-2001 (Wage Order) <http:// www. dir. ca. gov/ IWC/ IWCArticle 9. pdf> (as of Mar. 10, 2009), codified at California Code of Regulations, title 8, section

11090. More specifically, Athens allegedly failed to provide meal periods and to pay an additional hour of compensation per workday to employees who missed a meal period. The third cause of action alleges a separate violation of section 226.7 and the Wage Order by failing to provide rest periods and to pay an additional hour of compensation per workday to employees who missed a rest period. In the fourth cause of action, the complaint asserts a violation of sections 226, 1174, and 1174.5, as well as the Wage Order, by failing to provide necessary payroll information to employees and failing to maintain records on each employee showing all hours worked and all meal periods taken. The fifth cause of action seeks civil penalties authorized by the PAGA for violating the Labor Code as to Franco and other current and former employees; Franco alleges he exhausted the requisite administrative remedies under the act. (See §§ 2699.3, 2699.5.) The sixth cause of action alleges a violation of the California Unfair Competition Law (Bus. & Prof.Code, § 17200 et seq.).

B. The Petition to Compel Arbitration

On June 22, 2007, Athens filed a petition to compel arbitration and to dismiss or stay the civil action. The petition stated that Athens was in the business of trash removal, hauling, disposal, and recycling and was engaged in interstate commerce within the meaning of the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16). Athens alleged that arbitration was required under the arbitration agreement signed by Franco-written in Spanish-which was attached as an exhibit. According to

the petition, the arbitration would be conducted pursuant to the employment arbitration rules of the American Arbitration Association (AAA). Further, "AAA . . . has promulgated supplemental rules for class arbitrations, including rules permitting the AAA and the arbitrator to determine whether and when class claims may be pursued in arbitration and the procedures for arbitration of such claims."

Nevertheless, the attached arbitration agreement provided that "both you and the Company forgo and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity. . . . No remedies that otherwise would be available to you individually or to the Company in a court of law, however, will be forfeited by virtue of this agreement. . . . [¶] . . . The parties in any such arbitration will be limited to you and the Company. . . ."

Small claims actions were exempt from arbitration, whether brought by the employee or the company. The agreement provided that it would be governed by the FAA.

C. Proceedings on the Petition

On July 23, 2007, Athens filed a notice of hearing, a memorandum of points and authorities, and supporting evidence, setting the hearing for August 16, 2007. Athens made a straightforward argument: Under the FAA, arbitration was mandatory.

On August 3, 2007, Franco filed opposition papers, asserting that the class arbitration waiver was (1) invalid under *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*) and (2) unconscionable because it prevented him from acting as a private attorney general under the PAGA. Franco contended that the arbitration agreement was so tainted with illegality that Athens's petition should be denied in its entirety.

In its reply, Athens argued that Franco had not filed a timely response to the petition, thereby admitting all of Athens's allegations. (See Code Civ. Proc., §§ 1290, 1290.6.) Athens distinguished *Discover Bank* as involving a class arbitration waiver in consumer litigation where small sums of damages are caused by a fraudulent credit card scheme. Finally, Athens stated that Franco could seek the penalties authorized under the PAGA because nothing in the arbitration agreement precluded him from doing so.

The petition was heard on August 20, 2007. During argument, the trial court expressed the view that *Discover Bank* did not extend to employment cases. By order of the same date, the trial court granted the petition and directed Franco to submit his claims to arbitration in accordance with the arbitration agreement, that is, as individual claims. The trial court also ordered that the civil action be dismissed, but the court retained "jurisdiction to either vacate the dismissal in order to enter any order(s) necessary to enforce this order or to aid the arbitration so ordered, or to enter an order to confirm, modify or vacate any award entered

in the arbitration proceedings so ordered." Franco filed an appeal from the order granting the petition.

Meanwhile, on September 4, 2007, Franco filed a motion for reconsideration based on the Supreme Court's August 30, 2007 decision in *Gentry*, *supra*, 42 Cal.4th 443, which extended the rationale of *Discover Bank* to overtime compensation claims. Notwithstanding Athens's opposition, the trial court granted reconsideration and, by order dated October 22, 2007, instructed the parties to file supplemental papers, stating "the *Gentry* opinion establishes that a class action arbitration waiver in an employment agreement may be unconscionable."

1. Franco's Supplemental Memorandum

Franco worked for Athens from May 22, 2005, to May 10, 2006. He submitted evidence showing that, based on his hourly wage, his estimated damages for the alleged denial of meal and rest periods totaled $7,750; he would also be entitled to approximately $2,500 in civil penalties. As for Franco's overtime allegations, he was owed around $15,000 in lost pay and $1,250 in civil penalties. Franco filed a declaration in which he stated that, during his employment with Athens: (1) he did not know he was entitled to an hour's pay if Athens did not give him a meal or rest period; (2) he was not aware of all of his rights under the Labor Code or other labor law; (3) in his experience, employees who complained about working conditions were "looked down on" by management and "often los[t] their jobs or [were]

treated in ways that force[d] them to quit"; and (4) he "did not feel secure enough to complain about anything [he] may have felt was wrong. . . . [He] felt that if [he] complained about anything [he]would be fired."

Franco filed declarations from three attorneys who specialize in employment law **545 and class actions. As one of Franco's attorneys explained, "Without the ability to litigate these [labor] cases as a class proceeding, my firm could not represent the individual class members especially if we had [to] arbitrate each one separately because of the low damages present in many of these cases, including this one." The other two attorneys were of the same view. One attorney opined that "paying the claims of each individual employee who happens to walk into my or another attorney's office will not deter the employer from continuing to deny meal and rest periods or force the employer to pay its employees the wages due. Rather, preventing class proceedings from occurring will only allow this and other employers to pay the claims of a few employees, if any, and continue violating the Labor Code unabated."

Franco asserted that the petition to compel arbitration should be denied in its entirety because (1) the class arbitration waiver was unconscionable and (2) the private attorney general prohibition precluded him from recovering civil penalties under the PAGA on behalf of other current and former employees.

2. Athens's Supplemental Memorandum

Athens submitted evidence that Franco was employed as a waste hauling driver, he held a commercial driver's license, and he drove one of the company's trash trucks, a three-axle commercial vehicle weighing more than 10,000 pounds.

An operator of that type of vehicle is exempt from the overtime provisions of the Labor Code (§§ 510, 1194). (See Cal.Code Regs., tit. 13, § 1200, subd. (a); Veh.Code, § 34500, subd. (a).) Rather, the operator is subject to the regulations of the Department of the California Highway Patrol. (See Cal.Code Regs., tit.13, §§ 1200-1216.) Franco did not contend he was entitled to overtime compensation based on those regulations. Nor did he suggest another ground for overtime pay under state or federal law, such as the federal Fair Labor Standards Act (FLSA) (29 U.S.C. § 201 et seq.). (See 29 U.S.C. § 213(b)(1) [certain commercial drivers exempt from overtime provisions of FLSA]; 1 Wilcox, Cal. Employment Law (2008) §§ 3.03[1][b], 3.03[2][b], pp. 3-16.1 to 3-17, 3-19 & fn. 40 [certain commercial drivers exempt from California and federal overtime laws].)

Athens also offered evidence that its drivers were told more than once, sometimes in both English and Spanish, to take all required meal and rest periods. The company posted the Wage Order where drivers congregated. Also, Athens utilized an electronic timecard system, and employees "swiped" their individual badges when arriving and leaving the

workplace. The company kept accurate computerized records of the hours worked by its drivers. Athens had a policy not to permit or tolerate retaliation against employees for reporting problems, making complaints, or asserting their legal rights.

Athens argued that *Gentry* did not apply for several reasons and urged the trial court to issue an order compelling arbitration under the arbitration agreement as written.

3. The Trial Court's Ruling

On December 6, 2007, the trial court heard further argument on the petition to compel arbitration and took the matter under submission. Later that day, the court issued an order granting the petition and directing Franco to submit his claims to arbitration in accordance with the arbitration agreement. In its order, the trial court stated that Franco had no overtime claim under the Labor Code, and thus *Gentry* did not apply. Assuming *Gentry* applied to the nonovertime claims, Franco had failed to show that class arbitration would be significantly more effective than individual arbitrations. As shown by Athens's evidence, Franco's claims concerning meal and rest periods were not suitable for class treatment because of the preponderance of individualized issues, the specific inquiries into the merits of each individual's claims, and the varying extent of liability. Last, Athens's arbitration program would not disadvantage any employee who pursued claims through individual arbitration.

Franco did not appeal from the December 6, 2007 order but relied on the earlier appeal from the August 20, 2007 order.

II

DISCUSSION

" ' "Whether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court." [¶] . . . Where the trial court's decision on arbitrability is based upon resolution of disputed facts, we review the decision for substantial evidence. . . .' " (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 685.)

The party opposing arbitration has the burden of establishing that an arbitration provision is invalid. (See *Brown v. Wells Fargo Bank, NA* (2008) 168 Cal.App.4th 938, 955.) "[T]o the extent the trial court's determination that the arbitration agreement was [valid] turned on the resolution of conflicts in the evidence or on factual inferences to be drawn from the evidence, we consider the evidence in the light most favorable to the trial court's ruling and review the trial court's factual determinations under the substantial evidence standard." (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892.)

Appendix A

A. Preliminary Issues

At the outset, we address issues concerning (1) appealability, (2) Franco's allegedly untimely response to the petition, and (3) the trial court's handling of the overtime claim.

1. Appealability

Athens contends that Franco's appeal from the first order was improper, and the appeal should be dismissed because the trial court's reconsideration of that order had the effect of vacating it. We disagree. The first order found that the class arbitration waiver was enforceable and instructed Franco to arbitrate his claims individually. That was the "death knell" of class litigation through arbitration. Any subsequent motion for reconsideration or renewal in the trial court had no effect on the appealability of the first order. Consequently, Franco filed a proper appeal. (See *Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806, 810-814; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶¶ 2:39 to 2:39.1, p. 2-25 (rev. # 1, 2008).)

2. Timeliness of Franco's Response

Under the California Arbitration Act (Code Civ. Proc., §§ 1280-1294.2), "[a] copy of the petition and a written notice of the time and place of the hearing thereof and any other papers upon which the petition is based shall be served in the manner provided [herein]."

(*Id.*, § 1290.4, subd. (a).) "A response shall be served and filed within 10 days after service of the petition. . . ." (*Id.*, § 1290.6.) If a response is not "duly served and filed," the allegations of the petition "are deemed to be admitted." (*Id.*, § 1290.)

Athens argued, and the trial court found, that Franco did not serve and file a timely response to the petition. Assuming for purposes of appeal that the trial court was correct, the untimeliness of the response is of no import. None of the allegations in the petition concerns the questions before us.

3. The Overtime Claim

In determining the validity of a class arbitration waiver, the trial court must consider the plaintiff's theories of liability and the amount of the typical individual recovery. (See *Gentry*, *supra*, 42 Cal.4th at pp. 457-458 & fn. 4 [average recovery for state overtime claims], 459 [median award in federal age discrimination suits]; *Discover Bank*, *supra*, 36 Cal.4th at p. 154 [amount of unlawful late fee imposed on credit card payments in suit based on breach of contract and Delaware consumer fraud statute].) Franco relied on provisions of the Labor Code as the basis of his overtime claim.

Athens argued Franco was exempt from state overtime laws based on evidence that he drove a commercial truck having three axles and weighing over 10,000 pounds. (See Cal.Code Regs., tit. 13, § 1200, subd.

(a); Veh.Code, § 34500, subd. (a).) The trial court agreed, ruled that Franco had no overtime claim, and gave it no consideration in determining the validity of the class arbitration waiver. The court also found that the waiver was valid as to the remaining claims for meal and rest period violations. The result, as stated, was the "death knell" of class arbitration-the equivalent of an order denying class certification.

This procedural history raises concerns about the trial court's decisionmaking process. It may well be that, as a matter of law, Franco is exempt from state overtime laws. And the exemption may be quite easy to prove. Yet, the trial court did not follow established procedures in finding that Franco was an exempt employee. As noted in *Gentry*, "The kind of inquiry a trial court must make [in deciding whether to invalidate a class arbitration waiver] is similar to the one it already makes to determine whether class actions are appropriate." (*Gentry*, *supra*, 42 Cal.4th at p. 463.) The inquiry into class certification, however, does not include consideration of the merits or sufficiency of a plaintiff's cause of action.

"[W]e view the question of [class] certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious. Nonetheless, we remain mindful that if the class action is to prove a useful tool to the litigants and the court, trial courts must be accorded the flexibility 'to adopt innovative procedures, which will be fair to the litigants and expedient in serving the judicial process.' . . . Here, [the

defendant] argues that a court's decision whether to certify a class . . . should be informed by an evaluation of the merits of the proposed class claims. . . .

"We agree that the important interests of fairness and efficiency sometimes may be served better when class causes of action are screened for legal sufficiency before the matter of certification is decided. But nothing prevents a court from weeding out legally meritless [claims] prior to certification via a defendant's demurrer or pretrial motion. In fact, it is settled that courts are authorized to do so. . . .

"When the substantive theories and claims of a proposed class suit are alleged to be without legal or factual merit, the interests of fairness and efficiency are furthered when the contention is resolved in the context of a formal pleading (demurrer) or motion (judgment on the pleadings, summary judgment, or summary adjudication) that affords proper notice and employs clear standards. Were we to condone merit-based challenges as part and parcel of the certification process, similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims. . . . [P]rocedures already exist for early merit challenges." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-441, citations and fn. omitted.)

Here, the trial court granted a de facto summary adjudication motion on the overtime claim in determining the enforceability of a class arbitration

waiver. That was error. Absent a demurrer or dispositive motion-Athens brought none-Franco's overtime claim had to be considered as part of the case in deciding the validity of the class arbitration provision.

And, as we shall discuss, the trial court erred in upholding the class arbitration waiver with respect to the meal and rest period claims.

B. The Class Arbitration Waiver

Gentry held that "at least in some cases," "class arbitration waivers in employment arbitration agreements may [not] be enforced to preclude class arbitrations by employees whose rights to overtime pay pursuant to [the Labor Code] allegedly have been violated." (*Gentry, supra*, 42 Cal.4th at p. 450.) The court observed that in those cases, "the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws." (*Ibid.*) In the present case, the trial court improperly disposed of Franco's overtime claim, leaving only the meal and rest period claims for its consideration. (See pt. II.A.3., *ante.*)

Thus, the primary issue on appeal is whether *Gentry* applies to claims for meal and rest periods under the Labor Code (§§ 512, 226.7) and the Wage Order (§§ 11, 12). We conclude it does. *Discover Bank*, a consumer case, laid the foundation for *Gentry*, an overtime case. And it is but a small step from the overtime claims in

Gentry to the meal and rest period claims here. Although overtime compensation is undoubtedly important (see *Gentry*, *supra*, 42 Cal.4th at p. 456), the state has a significant interest in making sure that the drivers of commercial vehicles receive sufficient food and rest while on the job.

1. Unwaivable Statutory Rights

"Meal and rest periods have long been viewed as part of the remedial worker protection framework. . . . Concerned with the health and welfare of employees, the [Industrial Welfare Commission] issued wage orders mandating the provision of meal and rest periods in 1916 and 1932, respectively. The wage orders required meal and rest periods after specified hours of work. The only remedy available to employees, however, was injunctive relief aimed at preventing future abuse. In 2000, due to a lack of employer compliance, the [commission] added a pay remedy to the wage orders, providing that employers who fail to provide a meal or rest period 'shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day' that the period is not provided." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105-1106, citations omitted.)

In rejecting an employer's challenge to the meal period requirements of several wage orders, one court explained: "This section [on meal periods] states the circumstances requiring the employer to provide at least a 30-minute meal period [and] when the meal period shall

be included in the time worked. . . . The statements describe the history of the section commencing in 1916, that it has been substantially the same since 1947, and provide for exemptions under certain circumstances. [¶] . . . [¶]

"The trial court found, and we agree, that, 'A lesson taught by experience since 1947 concerning a thirty minute [lunch] period, not to mention the fact that no great change in mankind's makeup has been noted in the past thirty years that would indicate he now needs either more or less time to eat than he did thirty years ago both provide an adequate basis [for the orders].'

"Where the evidence clearly supports an existing order, and where the most basic demands of an employee's health and welfare are so obvious, the statement of basis describing the history and confirming the finding is sufficient to permit meaningful judicial review. When stating the obvious[,] little detail is required." (*California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 114-115.)

The same court addressed the validity of rest periods: "This section [of the wage orders] provides a mandatory 10-minute rest period net, for every four hours worked, without wage deductions.

"The statements trace the history of the section, commencing in 1932, and reaffirm that the requirement is reasonable and minimal. [¶] . . . [¶]

"Employee welfare demands in this area are . . . obvious. . . . Just as the consumption process is essential to humankind, so is the elimination process, and these needs have not greatly changed in the last 40 years. [Regarding] the length of the rest period, it is sufficient to state that experience has shown that 10 minutes is reasonable." (*California Manufacturers Assn. v. Industrial Welfare Com.*, *supra*, 109 Cal.App.3d at p. 115.)

As for the statutory basis for the wage order in this case, section 226.7 states: "(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

"(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

Under section 516, "the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers."

In language that closely parallels section 512, subdivision (a), the Wage Order states: "(A) No employer

shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

"(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

"(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

"(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided. [¶] . . . [¶]

"(F) [This] section shall not apply to any public transit bus driver covered by a valid collective bargaining agreement if the agreement expressly provides for meal periods for those employees. . . ." (Wage Order, § 11(A)-(D), (F).)

Thus, if the employee works a "short" day-six hours or less-a meal period is unnecessary if the employer and employee so agree. There is no contention here that Franco, or any employee he seeks to represent, worked a short day.

On the subject of rest periods, the Wage Order states: "(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

"(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

"(C) This section shall not apply to any public transit bus driver covered by a valid collective bargaining agreement if the agreement expressly provides for rest periods for those employees. . . ." (Wage Order, § 12(A)-(C).)

Athens contends that *Discover Bank* and *Gentry* are not applicable here because meal and rest periods are *waivable* statutory rights. Actually, in *Discover Bank*, the court expressed a lack of concern with waivability, noting that "plaintiff does not plead a [cause of action under the Consumer Legal Remedies Act (Civ.Code, § 1750 et seq.)] and so does not invoke its antiwaiver provision; nor does he seek recovery under any other California statute as to which a class action remedy is essential. . . . Rather, plaintiff contends that class action or arbitration waivers in consumer contracts, and in this particular contract, should be invalidated as unconscionable under California law." (*Discover Bank*, *supra*, 36 Cal.4th at p. 160, citation and fn. omitted.)

Gentry, on the other hand, emphasized that overtime compensation is unwaivable. (See *Gentry*, *supra*, 42 Cal.4th at pp. 450, 455-457.) " 'Entitlement to overtime compensation . . . is mandated by statute and is based on an important public policy. . . . "The duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer. . . . California courts have long recognized [that] wage and hours laws 'concern not only the health and welfare of the workers themselves but also the public health and general welfare.' " ' " (*Id.* at p. 456.)

"[T]he statutory right to receive overtime pay embodied in section 1194 is unwaivable." (*Ibid.*)

"We have not yet considered whether a class arbitration waiver would lead to a de facto waiver of statutory rights, or whether the ability to maintain a class action or arbitration is 'necessary to enable an employee to vindicate . . . unwaivable rights in an arbitration forum.' . . . We conclude that under some circumstances such a provision would lead to a de facto waiver and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." (*Gentry*, *supra*, 42 Cal.4th at p. 457, citation omitted.)

Section 226.7, subdivision (a), requires employers to comply with the meal and rest period provisions of the Wage Order. That section appears in division 2 ("Employment Regulation and Supervision"), part 1 ("Compensation"), chapter 1 ("Payment of Wages"), article 1 ("General Occupations") of the Labor Code. Section 219, found in the same article as section 226.7, states: "[N]o provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

As the Ninth Circuit has explained: "[T]he [California] Labor Code provisions at issue, [primarily sections 226.7 and 512,] as well as the wage order, are designed to protect individual employees. Indeed, meal period provisions address some of 'the most basic demands of an employee's health and welfare.' . . .

Moreover, the text of the wage order and the statutory provisions . . . make clear that the right to meal periods is a generally applicable labor standard that is *not subject to waiver by agreement.* As stated plainly in § 219, the right cannot 'in any way be contravened or set aside by a private agreement, whether written, oral or implied.' " (*Valles v. Ivy Hill Corp.* (9th Cir.2005) 410 F.3d 1071, 1081, citation omitted, italics added.) Thus, to the extent *Gentry* may be limited to unwaivable statutory rights, it applies here because, under section 219, the meal and rest period laws cannot be waived.

2. The *Gentry* Factors

Gentry pointed out that "although '[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses,' . . . such a waiver can be exculpatory in practical terms because it can make it very difficult for those injured by unlawful conduct to pursue a legal remedy. [The plaintiff] argues persuasively that class action waivers in wage and hour cases and overtime cases would have, at least frequently *if not invariably*, [an] exculpatory effect for several reasons, and would therefore undermine the enforcement of the statutory right to overtime pay.

"First, individual awards in wage and hour cases tend to be modest. In addition to the fact that litigation over minimum wage by definition involves the lowest-wage workers, overtime litigation also usually involves workers at the lower end of the pay scale, since professional, executive, and administrative employees

are generally exempt from overtime statutes and regulations." (*Gentry, supra*, 42 Cal.4th at pp. 457-458, citation omitted, italics added.)

Franco was a trash truck driver. When he left Athens in May 2006, he was earning $15.50 an hour. His total damages for the meal and rest period violations, as alleged, come to approximately $7,750, plus $2,500 in civil penalties-an amount too high for a small claims action (Code Civ. Proc., § 116.221) and too low, as a practical matter, to be pursued as an individual claim, either in court or through arbitration. And the possibility of an award of attorney fees would not provide a sufficient incentive for an attorney to take a case like Franco's as an individual matter. (See, e.g., Lab.Code, § 1194, subd. (a) [authorizing award of attorney fees], 218.5 [same], 2699, subd. (g)(1) [same].) "Even assuming that such attorney fees were equally available in arbitration, employees and their attorneys must weigh the typically modest recovery, and the typically modest means of the employees bringing . . . lawsuits, with the risk of not prevailing and being saddled with the substantial costs of paying their own attorneys. Moreover, the award of 'reasonable' fees and costs is at the discretion of the trial court. Assuming that the arbitrator had similar discretion, there is still a risk that even a prevailing plaintiff/employee may be undercompensated for such expenses." (*Gentry, supra*, 42 Cal.4th at pp. 458-459.) Consequently, with respect to the amount of a plaintiff's potential recovery, overtime cases such as *Gentry* are legally indistinguishable from meal and rest period cases. If anything, overtime cases

have a higher value. And here, even if Franco's overtime claim is included in the analysis-raising his total potential recovery to $26,500-the class arbitration waiver would fare no better. (See *id.* at p. 458 [individual recovery of $37,000 provides insufficient incentive to obviate need for class action].)

Second, "a *current* employee who individually sues his or her employer is at greater risk of retaliation. We have recognized that retaining one's employment while bringing formal legal action against one's employer is not 'a viable option for many employees.' . . . The difficulty of suing a *current* employer is likely greater for employees further down on the corporate hierarchy." (*Gentry*, *supra*, 42 Cal.4th at pp. 459-460, italics added.)

Of course, Franco is no longer working at Athens. But that simply strengthens his status as the representative in a *class* action or *class* arbitration because "it is 'reasonably presumed' potential class members *still employed* by [the] employer 'might be unwilling to sue individually or join a suit for fear of retaliation at their jobs.' " (*Id.* at p. 460, italics added.) "[S]ince here a number of putative members [of the class] are *current* employees, the concern for possible employer reprisal action exists. . . ." (*Ibid.*, italics added.) "[I]f individual joinder were required, 'most, if not all, of the *current* employees will be hesitant to join.' " (*Ibid.*, italics added.) As one court has noted, " ' "Although there is only plaintiff's *suggestion* of intimidation in this instance, the nature of the economic

dependency involved in the employment relationship is *inherently* inhibiting.' " (*Ibid.*, italics added.) "Federal courts have widely recognized that fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation. . . ." (*Ibid.*)

Athens's focus on the mere existence of its nonretaliation policy misses the mark. The pertinent question is whether a nonretaliation policy achieves its goal. Franco's declaration stated he "did not feel secure enough to complain about anything [he] may have felt was wrong. . . . [He] felt that if [he] complained about anything [he]would be fired." According to Athens's evidence, employees felt comfortable going to the payroll department to report a calculation error in a paycheck or a shortage in pay "for a certain day or week." But the issue here is how the company would react to an internal grievance asserting the violations raised in Franco's civil complaint, namely, the wholesale disregard of the meal and rest period laws as to numerous employees over an extended period of time. As recognized in an analogous context: "[S]tatistics are supportive of [the] position that retaliation against employees for asserting statutory rights under the Labor Code is widespread. Given that retaliation would cause immediate disruption of the employee's life and economic injury, and given that the outcome of the [Labor Commissioner's] complaint process is uncertain, we do not believe the existence of an antiretaliation statute and an administrative complaint process undermines [the plaintiff's] point that fear of retaliation

will often deter employees from individually suing their employers." (*Gentry*, *supra*, 42 Cal.4th at p. 461.) The same fear and deterrence exist despite an employer's voluntarily adopted nonretaliation policy.

Third, "some individual employees may not sue because they are unaware that their legal rights have been violated. . . . [I]t may often be the case that the illegal employer conduct escapes the attention of employees." (*Gentry*, *supra*, 42 Cal.4th at p. 461.) Athens may have taken steps, including bilingual efforts, to implement the meal and rest period laws, but Franco-who appears to be more proficient in Spanish than English-did not know there was a remedy for a missed meal or rest period. "Some workers, particularly [those] with limited English language skills, may be unfamiliar with [labor] laws." (*Ibid.*) In a class proceeding, current and former employees would receive written notice of their rights.

Last, " 'class actions may be needed to assure the effective enforcement of statutory policies even though some claims are large enough to provide an incentive for individual action. While employees may succeed under favorable circumstances in recovering [for] unpaid [missed breaks] through a lawsuit or a wage claim filed with the Labor Commissioner, a class action may still be justified if these alternatives offer no more than the prospect of "random and fragmentary enforcement" of the employer's legal obligation[s]. . . .' . . . 'By preventing "a failure of justice in our judicial system" . . . , the class action not only benefits the

individual litigant but serves the public interest in the enforcement of legal rights and statutory sanctions.' . . . In other words, absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying [for missed meal and rest periods]." (*Gentry*, *supra*, 42 Cal.4th at p. 462, bracketed material added.) As stated in one of Franco's three attorney declarations, "preventing class proceedings from occurring will only allow this and other employers to pay the claims of a few employees, if any, and continue violating the Labor Code unabated."

The *Gentry* court summarized: "[W]hen it is *alleged* that an employer has *systematically* denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the factors discussed above: the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration. If it concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must

invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.' . . . The kind of inquiry a trial court must make is similar to the one it already makes to determine whether class actions are appropriate. '[T]rial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action. . . .' . . . Class arbitration must still also meet the 'community of interest' requirement for all class actions, consisting of three factors: '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' " (*Gentry*, *supra*, 42 Cal.4th at pp. 463-464, citations and fn. omitted, italics added.) As one treatise has noted: "Attempts by employers to bar class actions of wage and hour claims through private arbitration agreements are less likely to be successful [after *Gentry*]." (1 Advising Cal. Employers and Employees (Cont.Ed.Bar 2008) § 5.93, p. 470.)

Here, the complaint alleges that Athens systematically denied meal and rest periods to a class of employees; all drivers were subjected to identical violations; and drivers were not paid an hour of additional compensation per workday for the meal and rest periods they missed. As in *Gentry*, the size of the potential individual recovery is small, the possibility of retaliation against an employee who files an individual suit exists, and absent members of the class may be ill informed about their rights.

Appendix A

In the trial court, Athens submitted evidence to the effect that it does not violate the law. For example, the company president commented, "Athens' policy is to comply with the requirements of the [Wage Order] that are applicable to its drivers, and the company has undertaken a number of practices to ensure compliance with this policy." But this type of evidence goes to the merits of Franco's claims and is not to be considered on a petition to compel arbitration that involves a challenge to a class arbitration waiver. (See *Gentry*, *supra*, 42 Cal.4th at p. 463; *Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at pp. 439-441; *Graphic Arts Internat. Union v. Oakland Nat. Engraving Co.* (1986) 185 Cal.App.3d 775, 776, 780 & fn. 6.)[1]

We conclude the record does not support the trial court's determination that the employees' claims would be so individualized as to render class arbitration treatment significantly less effective than individual arbitrations. At this early stage in the litigation, we know that Athens uses a computer and an electronic timecard system to keep track of its employees' work hours. By law, an employer must maintain time records showing an employee's (1) "total daily hours worked" and (2) meal periods, unless "operations cease" during meals. (Wage

1. In *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, review granted October 22, 2008, S166350, the Supreme Court will address an issue concerning the merits of meal and rest period claims, namely, the scope of an employer's duty to ensure that employees take statutorily mandated breaks. The parties to this appeal agree that the issue in *Brinker* is not relevant here.

Order, § 7(A)(3).) Further, Athens allegedly engaged in a *systematic* course of illegal payroll *practices and policies* in violation of the Labor Code and subjected *all* of its hourly employees to the same unlawful conduct. As a result, common questions of law and fact predominate over individualized issues.

Here, class treatment would be more practical than individual actions, regardless of whether the claims are adjudicated through arbitration or in the trial court. (See *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1201, 1204-1208 [reversing trial court's denial of class certification in meal and rest period case, concluding that requirements of commonality, ascertainability, and superiority were all satisfied].) As stated in *Bufil:* "The trial court made a passing, perfunctory reference to superiority in its order denying class certification [of the meal and rest period claims], finding that plaintiffs did not establish that the class action is a superior method for resolving the litigation. Courts regularly certify class actions to resolve wage and hour claims. . . . In this arena the class action mechanism allows claims of many individuals to be resolved at the same time, eliminates the possibility of repetitious litigation and affords small claimants with a method of obtaining redress for claims which otherwise would be too insignificant to warrant individual litigation. . . . Moreover, the issues slated for contest are primarily common issues involving common evidence. It would not be efficient or fair to relegate these complaints to multiple trials." (*Id.* at p. 1208, citations omitted.)

C. Franco's Capacity as a Private Attorney General

If the sole problem with Athens's arbitration agreement were the class arbitration waiver, we would direct the trial court to strike the waiver and order the case to arbitration. (See *Gentry*, *supra*, 42 Cal.4th at p. 466.) Shortly after appointment, the arbitrator, applying AAA rules, would decide whether the dispute should proceed as a class arbitration. But the class arbitration waiver is not the only significant problem with the parties' agreement.

"If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. . . . [¶] . . . [M]ultiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124 [equating "multiple" defects with two unlawful provisions].)

The parties' arbitration agreement not only contains a class arbitration waiver but also prohibits an employee from acting as a "private attorney general." The PAGA authorizes an aggrieved employee-here, Franco-to recover civil penalties "on behalf of himself . . . and other current or former employees." (§ 2699, subd. (a).) The agreement does state, however, that employees may recover remedies due them " individually." We interpret this to mean that, under the PAGA, Franco could recover civil penalties for the violation of *his* rights. But the

PAGA also authorizes Franco to collect civil penalties on behalf of *other current and former employees.* The arbitration agreement expressly prohibits this. Accordingly, if the class arbitration waiver were stricken, the case were sent to arbitration, and the arbitrator certified the case as a class, the arbitration agreement would preclude an award of civil penalties on behalf of employees *other than* Franco.

The Legislature has made clear that an action under the PAGA is in the nature of an enforcement action, with the aggrieved employee acting as a private attorney general to collect penalties from employers who violate labor laws. Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions. Before the PAGA was enacted, an employee could recover damages, reinstatement, and other appropriate relief but could not collect civil penalties. The Labor and Workforce Development Agency (LWDA) collected them. The PAGA changed that. (See 1 Advising Cal. Employers and Employees, *supra*, §§ 5.97-5.100, pp. 472.2-474 [discussing PAGA].)

Our colleagues in Division Three have observed: "The PAG Act provides in relevant part at section 2699, subdivision (a): '*Notwithstanding any other provision of law*, any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the [LWDA] or any of its departments, divisions,

commissions, boards, agencies, or employees, for a violation of this code, *may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees. . . .*' . . .

". . . [T]he PAG Act empowers or deputizes an aggrieved employee to sue for civil penalties 'on behalf of himself or herself and other current or former employees' (§ 2699, subd. (a)), as an alternative to enforcement by the LWDA.

"The Legislature declared its intent as follows: '(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future. [¶] (d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general,* while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.' . . .

"The final bill analysis for the 2003 legislation states: 'This bill allows employees to sue their employers for civil penalties for employment law violations. *This bill is intended to augment the enforcement abilities of the Labor Commissioner by creating an alternative "private attorney general" system for labor law enforcement.*' . . .

"The final bill analysis explains: 'Existing law authorizes the [LWDA] . . . to assess and collect civil penalties for violations of the Labor Code, where specified. [¶] Existing law authorizes the Attorney General and other public prosecutors to pursue misdemeanor charges against violators of specified provisions of the code. [¶] Existing law authorizes an individual employee to file a claim with the Labor Commissioner alleging that [the] employer has violated specified provisions of the code, and to sue the employer directly for damages, reinstatement, and other appropriate relief if the Commissioner declines to bring an action based on the employee's complaint. [¶] Existing law further provides that any person acting for itself, its members, or the general public, may sue to enjoin any unlawful, unfair, or fraudulent business act or practice, and to recover restitution and disgorgement of any profits from the unlawful activity. [¶] This bill is entitled the "Labor Code Private Attorneys General Act of 2004," *and establishes an alternative "private attorney general" system for labor law enforcement that allows employees to pursue* ***civil penalties*** *for employment law violations.*' " (*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 337-338, citations omitted, boldface added.) When a plaintiff employee recovers a civil penalty under the PAGA, 75 percent is distributed to the LWDA "and 25 percent to the aggrieved employees." (§ 2699, subd. (i).) The PAGA defines "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c); see generally Chin et al., Cal. Practice

Appendix A

Guide: Employment Litigation (2008) ¶¶ 17:760 to 17:835, pp. 17-120 to 17-126 [discussing PAGA]; 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 324, pp. 416-418 [same].)

"The [PAGA] attempted to remedy the understaffing of California's labor law enforcement agencies by granting employees the authority to bring civil actions against their employers for Labor Code violations. Fearing the state's budget crisis [in 2003] would continue to prevent adequate Labor Code enforcement, the Act's sponsors intended to guarantee 'maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices.' Thus, under the Act, employees supplement the LWDA as Labor Code enforcers by 'deputizing' employees in the role of private attorney generals." (Review of Selected 2004 California Legislation, Chapter 221: A Necessary But Incomplete Revision of the Labor Code Private Attorneys General Act (2005) 36 McGeorge L.Rev. 877, 878-879, fns. omitted.) "In practice, an equilibrium between public and private enforcement actions will likely develop, leading to more thorough enforcement of the Labor Code and thereby the fulfillment of the Legislature's purpose in enacting the [PAGA]." (*Id.* at p. 894.) "[The] PAGA [is] a powerful tool for aggrieved employees." (Schloss & Cohorn, Assessing the Amended Labor Code

Appendix A

Private Attorneys General Act (Feb. 2006) 28 L.A. Law. 13, 17.)[2]

In addressing the amount of the civil penalty for a Labor Code violation, the PAGA states: "For all provisions of this code *except those for which a civil penalty is specifically provided*, there is established a civil penalty for a violation of these provisions, as follows: [¶] . . . [¶] . . . If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." (§ 2699, subd. (f)(2), italics added.) "Person" means "any person, association, organization, partnership, business trust, limited liability company, or corporation." (§ 18; see § 2699, subd. (b).)

Consequently, the question arises as to whether the additional hour of compensation for missed meal and rest periods is "a civil penalty . . . specifically provided" in section 226.7, which was enacted in 2000. (See 11 West's Cal. Legis. Service (2000) ch. 867, § 7, p. 4945.) If so, the additional hour of pay may qualify as the civil penalty imposed under the PAGA. But our Supreme

2. The Supreme Court is currently considering whether a PAGA suit that requests civil penalties on behalf of the plaintiff and other employees must be brought as a class action (*Arias v. Superior Court* (2007) 153 Cal.App.4th 777, review granted Oct. 10, 2007, S155965). Franco seeks to maintain the present case as a class action.

Court has held that the extra hour of compensation is a wage or premium pay, not a penalty. (See *Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at pp. 1099, 1102-1111.) "[A]n employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime. . . . By contrast, Labor Code provisions imposing penalties state that employers are 'subject to' penalties and the employee or Labor Commissioner must first take some action to enforce them. The right to a penalty, unlike section 226.7 pay, does not vest until someone has taken action to enforce it." (*Murphy*, at p. 1108.)

That brings us, finally, to the penalties set forth in the Wage Order: "(A) In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty of:

"(1) Initial Violation—$50.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount which is sufficient to recover unpaid wages.

"(2) Subsequent Violations—$100.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount which is sufficient to recover unpaid wages.

"(3) The affected employee shall receive payment of all wages recovered." (Wage Order, § 20(A)(1)-(3).)

Accordingly, the Wage Order specifically provides civil penalties for violations of section 226.7. In fact, those penalties became operative in 2001, three years before the PAGA went into effect. (See *Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at pp. 1105-1106 & fn. 8; 13 West's Cal. Legis. Service (2003) ch. 906, § 2, pp. 5178-5180; Cal. Const., art. IV, § 8, subd. (c)(1); History, Cal.Code Regs., tit. 8, § 11090, foll. subd. 22; compare Cal.Code Regs., tit. 8, § 11090, subd. 20, Register 97, No. 32 (Aug. 8, 1997) with *id.*, tit. 8, § 11090, subd. 20, Register 2002, No. 19 (May 10, 2002).)

Here, under the arbitration agreement, Athens sought to nullify the PAGA and preclude Franco from seeking civil penalties on behalf of other current and former employees, that is, from performing the core function of a private attorney general. Yet, by prohibiting enforcement of the PAGA, the arbitration agreement impedes *Gentry's* goal of "comprehensive[ly] enforc[ing]" a statutory scheme through the imposition of "statutory sanctions" and "fines." (*Gentry*, *supra*, 42 Cal.4th at pp. 463, 462, 64 Cal.Rptr.3d 773, 165 P.3d 556.) Thus, the prohibition of private attorneys general is invalid.

Because the arbitration agreement contains a class arbitration waiver and also precludes Franco from seeking civil penalties on behalf of other employees, contrary to the PAGA, we conclude that the agreement

as a whole is tainted with illegality and is unenforceable. (See *Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal.4th at pp. 124-125.) Athens's petition to compel arbitration should therefore be denied, and this case should proceed in a court of law.

III

DISPOSITION

The order granting the petition to compel arbitration is reversed, and the trial court is directed to place this case on the civil active list. Plaintiff is entitled to costs on appeal.

CERTIFIED FOR PUBLICATION.

MALLANO, P.J.

We concur:

ROTHSCHILD, J.

BAUER, J.*

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* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES DATED AND FILED DECEMBER 6, 2007

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES

CASE NO. BCB69201

EDIXON FRANCO,

Plaintiff,

vs.

ATHENS DISPOSAL COMPANY, INC., dba ATHENS SERVICES, et al.,

Defendants.

ORDER GRANTING DEFENDANT'S PETITION TO COMPEL ARBITRATION FOLLOWING RECONSIDERATION OF AUGUST 20, 2007 ORDER GRANTING PETITION TO COMPEL ARBITRATION

Date: December 6, 2007
Time: 8:30 a.m.
Dept.: 30
Judge: Hon. Elizabeth A. Grimes

On December 6, 2007, at 8:30 a.m. in Department 30 of this Court, the Honorable Elizabeth A. Grimes presiding, Defendant's Petition to Compel Arbitration

was re-heard. Sean McLoughlin of Hill, Farrer & Burrill LLP appeared on behalf of petitioner and defendant ATHENS DISPOSAL COMPANY, INC. ("Defendant"). Thomas Campbell of Rastegar & Matern appeared on behalf of plaintiff EDIXON FRANCO ("Plaintiff" or "Franco").

The Court, having on August 20, 2007 entered an Order granting the Petition, has now re-considered that Order and the Petition, at the request of Plaintiff and in light of the new law articulated by the California Supreme Court in the *Gentry* case. The Court has considered the Petition, the lack of timely response to the Petition, the moving, reply and supplemental reply papers, declarations, exhibits and authorities submitted in support of the Petition, the Plaintiff's opposition and supplemental opposition papers, the objections to Plaintiff's proffered evidence and all other matters presented at or before the hearing of this matter, and having considered such matters, makes the following findings: Plaintiff and the entire putative class are commercial truck drivers operating three axle trash trucks weighing in excess of 10,000 pounds, whose hours of work are regulated by the California Highway Patrol pursuant to the Vehicle Code and Code of Regulations, and who are therefore exempt from California overtime laws. As a result, this case does not implicate California's overtime laws or the public policy embodied in them. As a result, the holding of *Gentry* does not extend to this case. Even if *Gentry* did apply to the non-overtime claims in this case, however, the Court further finds that Plaintiff has failed to carry his burden to show that

classwide arbitration would be significantly more effective than individual arbitrations under the system of arbitration created by Defendant's Mutual Arbitration Program. In this respect, the Court finds that Defendant has produced evidence that the meal and rest period penalty claims and "off the clock" work claims alleged by Plaintiff are unsuitable for class action treatment and will likely have to be adjudicated on an individual basis anyway due to the preponderance of individualized issues and inquiries necessary to determine the merits of each individual claim and the extent of any liability, and that Defendant's Mutual Arbitration Program does not in any way disadvantage employees who pursue claims in individual arbitrations.

Based on the above, the Court now enters the following order:

1. Defendant's Petition is GRANTED;

2. Pursuant to the Federal Arbitration Act, Plaintiff is ordered to submit all his claims and causes of action alleged in this action, and any related claims arising from or during his employment with Defendant to final and binding arbitration before the American Arbitration Association pursuant to the terms of his written agreement to arbitrate such claims under the Defendant's Mutual Arbitration Policy.

3. Plaintiff's action is hereby DISMISSED, with the Court retaining jurisdiction to vacate the dismissal in order either to enter any order(s) necessary to enforce this order or to aid the arbitration so ordered, or to enter an order to confirm, modify or vacate any award entered in the arbitration proceedings so ordered.

IT IS SO ORDERED.

DATED: December 6, 2007

s/ Elizabeth A. Grimes
JUDGE OF THE SUPERIOR COURT

APPENDIX C — ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES DATED AND FILED AUGUST 20, 2007

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES

CASE NO. BC362125

EDIXON FRANCO,

Plaintiff,

vs.

ATHENS DISPOSAL COMPANY, INC., dba ATHENS SERVICES, et al.,

Defendants.

ORDER GRANTING DEFENDANT'S PETITION TO COMPEL ARBITRATION

Date: August 20, 2007
Time: 8:30 a.m.
Dept.: 30
Judge: Hon. Elizabeth A. Grimes

On August 20, 2007, at 8:30 a.m. in Department 30 of this Court, the Honorable Elizabeth A. Grimes presiding, Defendant's Petition to Compel Arbitration was heard. Sean McLoughlin of Hill, Farrer & Burrill LLP appeared on behalf of petitioner and defendant ATHENS DISPOSAL COMPANY, INC. ("Defendant"). Rastegar &

Appendix C

Matern appeared on behalf of plaintiff EDIXON FRANCO ("Plaintiff" or "Franco").

The Court, having considered the Petition, the lack of timely response to the Petition, the moving, and reply papers and the exhibits and authorities submitted in support of the Petition, the Plaintiff's opposition, and all other matters presented at or before the hearing of this matter, the Court now enters the following order:

1. Defendant's Petition is GRANTED;

2. Pursuant to the Federal Arbitration Act, Plaintiff is ordered to submit all his claims and causes of action alleged in this action, and any related claims arising from or during her employment with Defendant to final and binding arbitration before the American Arbitration Association pursuant to the terms of his written agreement to arbitrate such claims under the Defendant's Mutual Arbitration Policy.

3. Plaintiff's action is hereby DISMISSED, with the Court retaining jurisdiction to either vacate the dismissal in order, to enter any order(s) necessary to enforce this order or to aid the arbitration so ordered, or to enter an order to confirm, modify or vacate any award entered in the arbitration proceedings so ordered.

IT IS SO ORDERED.

DATED: August 20, 2007

s/ Elizabeth A. Grimes
JUDGE OF THE SUPERIOR COURT

APPENDIX D — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED JUNE 17, 2009

S172223

IN THE SUPREME COURT OF CALIFORNIA

En Banc

EDIXON FRANCO, Plaintiff and Appellant,

v.

ATHENS DISPOSAL COMPANY, INC. DBA ATHENS SERVICES, Defendant and Respondent.

The petition for review is denied.

s/ GEORGE
Chief Justice

Supreme Court, U.S.
FILED
DEC 4 - 2009

No. 09-272

IN THE

Supreme Court of the United States

ATHENS DISPOSAL COMPANY, INC.
dba ATHENS SERVICES,

Petitioner,

v.

EDIXON FRANCO,

Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division One

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December 2009

QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Class-action bans—contract provisions that deny the right to pursue classwide relief, whether through litigation or arbitration—may be held invalid in some circumstances under generally applicable state contract law. Is such state law preempted by the FAA when the class-action ban to which it is applied is embedded in an arbitration agreement?

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT 1

REASONS FOR DENYING THE WRIT 3

I. There Is No Conflict Over the Question Presented. 4

II. This Case Is a Poor Vehicle. 8

III. Athens' FAA Preemption Theory Is Wrong. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Adams v. Robertson,
520 U.S. 83 (1997) 10

Adkins v. Labor Ready, Inc.,
303 F.3d 496 (4th Cir. 2002) 6

Bailey v. Anderson,
326 U.S. 203 (1945) 10

Beck v. Washington,
369 U.S. 541 (1962) 10

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 11

Caley v. Gulfstream Aerospace Corp.,
428 F.3d 1359 (11th Cir. 2005) 5

Carter v. Countrywide Credit Industries,
362 F.3d 294 (5th Cir. 2004) 5

Circuit City v. Adams,
532 U.S. 105 (2001) 11

Crowell v. Randell,
35 U.S. 368 (1836) 10

Dale v. Comcast Corp.,
498 F.3d 1216 (11th Cir. 2007) 5, 6, 7

Delta Funding v. Harris,
912 A.2d 104 (N.J. 2006) 7

Discover Bank v. Superior Court of Los Angeles,
113 P.3d 1100 (Cal. 2005) 3, 4, 11

Dix v. ICT Group, Inc,
161 P.3d 1016 (Wash. 2007) 4

Doctor's Associates, Inc. v. Casarotto,
517 U.S. 681 (1996) 3, 12

Feeney v. Dell Inc.,
908 N.E.2d 753 (Mass. 2009) 4

Fiser v. Dell Computer Corp.,
188 P.3d 1215 (N.M. 2008) 4

Gay v. Creditinform,
511 F.3d 369 (3d Cir. 2007) 8

Gentry v. Superior Court,
165 P.3d 556 (Cal. 2007),
cert denied., 128 S. Ct. 1743 (2008) 2

Guz v. Bechtel National Inc.,
8 P.3d 1089 (Cal. 2000) 10

Harden v. Roadway Package Systems, Inc.,
249 F.3d 1137 (9th Cir. 2001) 11

Herb v. Pitcairn,
324 U.S. 117 (1945) 9

Homa v. American Express Co.,
558 F.3d 225 (3d Cir. 2009) 5, 8

Iberia Credit Bureau, Inc. v. Cingular Wireless,
379 F.3d 159 (5th Cir. 2004) 5

Jenkins v. First America Cash Advance of Georgia,
400 F.3d 868 (11th Cir. 2005) 6

Johnson v. West Suburban Bank,
225 F.3d 366 (3d Cir. 2000) 6

Kinkel v. Cingular Wireless LLC,
857 N.E.2d 250 (Ill. 2006) 4, 11

Kristian v. Comcast Corp.,
446 F.3d 25 (1st Cir. 2006) 6

Laster v. AT&T Mobility LLC,
584 F.3d 849 (9th Cir. 2009) 5

Leonard v. Terminix International Co., L.P.,
854 So. 2d 529 (Ala. 2002) 4

Livingston v. Associates Finance Inc.,
339 F.3d 553 (7th Cir. 2003) 6

Lowden v. T-Mobile USA,
512 F.3d 1213 (9th Cir. 2008),
cert. denied, 129 S. Ct. 45 (2008) 5

Lynch v. New York,
293 U.S. 52 (1934) 9

Muhammad v. County Bank of Rehoboth, Delaware,
912 A.2d 88 (N.J. 2006),
cert. denied, 127 S. Ct. 2032 (2007) 4, 7

Perry v. Thomas,
482 U.S. 483 (1987) 12

Randolph v. Green Tree Finance Corp.,
244 F.3d 814 (11th Cir. 2001) 6

Scott v. Cingular Wireless,
161 P.3d 1000 (Wash. 2007) 4, 11

Shroyer v. New Cingular Wireless Services, Inc.,
498 F.3d 976 (9th Cir. 2007) 5, 11

Snowden v. Checkpoint Cashing,
290 F.3d 631 (4th Cir. 2002) 6

State ex rel. Dunlap v. Berger,
567 S.E.2d 265 (W. Va. 2002) 4

Street v. New York,
394 U.S. 576 (1969) 9

Tillman v. Commercial Credit Loans, Inc.,
655 S.E.2d 362 (N.C. 2008) 4

Ting v. AT&T,
319 F.3d 1126 (9th Cir. 2003),
cert. denied, 540 U.S. 811 (2003) 5

Statutes

9 U.S.C. § 1 11

9 U.S.C. § 2 ..... 3, 12

Miscellaneous

Eugene Gressman, et al.,
Supreme Court Practice (9th ed. 2007) 10

INTRODUCTION

Athens Disposal Company asks this Court to review an intermediate state-court ruling that rests entirely on state contract law, and that does not even discuss the federal question presented in the petition. The question, in any event, is one on which the state and federal appellate courts are in unanimous agreement. Every state court of last resort and every federal appeals court to confront the question has reached the same conclusion—that the Federal Arbitration Act (FAA) does not preclude courts from assessing whether particular class-action bans are invalid under generally applicable state contract law. This Court has repeatedly denied petitions on the same question in recent years, and it should do the same here.

Despite the courts' unanimity on the question presented, Athens stretches to create the appearance of a conflict by citing cases that do not address FAA preemption of state law at all. Instead, Athens relies on cases addressing the very different question of whether a class-action ban may in some circumstances be incompatible with the remedial policies of a particular federal statute. Even on that question, which is not presented here, there is no conflict among the courts.

Finally, wholly apart from the lack of a conflict, certiorari is unwarranted because this case is a bad vehicle—particularly because Athens has not adequately demonstrated that this Court would even have jurisdiction over the case—and because Athens' FAA preemption theory is wrong on the merits.

STATEMENT

1. Petitioner Athens Disposal Company is in the business of collecting, hauling, and recycling trash. Re-

spondent Edixon Franco was employed by Athens as a truck driver. Franco sued Athens in 2007, alleging that the company had engaged in illegal payroll practices, including failing to provide employees with the meal and rest periods required by the California Labor Code. Because the alleged violations were systematic and widespread, the suit was brought as a class action. As authorized by California's Labor Code Private Attorneys General Act of 2004 (PAGA), the complaint also sought civil penalties for violations concerning both Franco and other current and former Athens employees.

Athens responded to Franco's complaint by seeking to compel arbitration. Its petition invoked a clause in the company's standard employee arbitration agreement providing that Athens and its employees "forgo and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity." The trial court granted Athens' petition and ordered the parties to arbitration. Pet. App. 43a-48a.

2. The California Court of Appeal for the Second District, Division One, reversed. Pet. App. 1a-42a. The court decided the case solely on the basis of state law. First, the court held that Athens' class-action ban, with respect to the alleged violations of the meal and rest-period laws, was invalid under generally applicable state law in light of "the modest size of the potential individual recovery, the potential for retaliation against members of the class, [and] the fact that absent members of the class may be ill informed about their rights." *Gentry v. Superior Court*, 165 P.3d 556, 568 (Cal. 2007), *cert. denied*, 128 S.Ct. 1743 (2008). Second, the court identified an independent state-law defect with the arbitration agreement: Because the

agreement would have precluded Franco from acting as a private attorney general under the PAGA (by seeking civil penalties for violations concerning other employees), the agreement impermissibly interfered with comprehensive enforcement of the statute. Accordingly, the court held that Athens' petition to compel arbitration should be denied and the case should proceed in a court of law.

The California Supreme Court denied Athens' petition for review without opinion. Pet. App. 49a.

REASONS FOR DENYING THE PETITION

Under the FAA, arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). This Court has consistently read that savings clause to mean that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). So long as the application of a state-law contract defense does not discriminate against arbitration, that application does not run afoul of the FAA. *Id.*

The sole question presented in Athens' petition is whether the FAA preempts the application of state contract law to invalidate a class-action ban embedded in an arbitration clause. Class-action bans are contract provisions that foreclose the right to seek classwide relief, whether through class-action litigation or classwide arbitration. Under the contract law of many states, such provisions may be held invalid under circumstances where the inability to seek any form of classwide relief effectively exculpates the drafter from potential liability for

individually small claims involving widespread practices. *See Discover Bank v. Superior Court*, 113 P.3d 1110, 1113 (Cal. 2005). State law in this regard applies equally to bans of class-action litigation in contracts without arbitration clauses as it does to bans of class arbitration in contracts with such clauses. *Id.*; *see, e.g., Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007).

I. THERE IS NO CONFLICT OVER THE QUESTION PRESENTED.

Every state court of last resort and every federal circuit to have decided the question has reached the same conclusion: The FAA does not preclude courts from assessing whether particular class-action bans are invalid under generally applicable state contract law.

To date, at least nine state high courts have reached that conclusion. *See Feeney v. Dell Inc.*, 908 N.E.2d 753, 762-68 (Mass. 2009); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008-09 (Wash. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260-63 (Ill. 2006); *Muhammad v. County Bank of Rehoboth, Del.*, 912 A.2d 88, 94-96 (N.J. 2006), *cert denied*, 127 S. Ct. 2032 (2007); *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100, 1110-17 (Cal. 2005); *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va. 2002).

The federal circuits that have decided the question presented have come to the same conclusion. The Third, Ninth, and Eleventh Circuits have all issued decisions finding particular class bans invalid under state law and concluding that the FAA does not preempt those rulings.

See, e.g., Laster v. AT & T Mobility LLC, 584 F.3d 849, 857-59 (9th Cir. 2009) (California law); *Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (New Jersey law); *Lowden v. T-Mobile USA*, 512 F.3d 1213, 1219-22 (9th Cir. 2008) (Washington law), *cert. denied*, 129 S.Ct. 45 (2008); *Schroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007) (California law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (Georgia law). These holdings are also consistent with two earlier Ninth Circuit decisions predicting California law prior to the California Supreme Court's decision in *Discover Bank*.[1]

In the absence of any contrary cases adopting its theory that the FAA precludes courts from holding class bans in arbitration agreements invalid under state law, Athens looks even further afield in an attempt to create a conflict. The petition (at 20-24) conflates two distinct legal issues—whether the FAA preempts rulings concerning the enforceability of class action bans under generally applicable state law, on the one hand, and whether a particular class-action ban conflicts with a federal remedial statute, on the other hand.

Most of the cases that Athens cites do not involve state-law unconscionability challenges at all, let alone the issue of federal preemption of state law. Instead, the cited cases decided the very different, purely federal, question of whether a class ban, under the circumstances, interferes with a plaintiff's ability to vindicate rights guaranteed by a particular federal statute, such as

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[1] *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003).

the Truth in Lending Act or the RICO Act.[2] The outcome of these cases turns on both the nature of the claims at stake and the particular federal statute. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 55-61 (1st Cir. 2006) (holding a class ban unenforceable because it interfered with the plaintiffs' ability to vindicate their rights under the Clayton Antitrust Act, but distinguishing other federal statutes). No conflict has yet emerged among these vindication-of-federal-rights cases. In any event, even if a conflict were to emerge, it would not implicate the question presented in this case, which is whether federal law precludes a *state-law* challenge to a class-action ban in a case involving only state-law claims.

One of the cases cited by the petition as evidence of a conflict, *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005), *did* involve a state-law unconscionability challenge to a class ban in an arbitration clause. But far from adopting Athens' preemption theory, *Jenkins* recognized that "[t]he FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." *Id.* at 875. Applying Georgia law, *Jenkins* concluded that there was no substantive unconscionability in that case, particularly given the abil-

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[2] *See Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159, 174 (5th Cir. 2004); *Livingston v. Assocs. Fin. Inc.*, 339 F.3d 553 (7th Cir. 2003); *Snowden v. Checkpoint Cashing*, 290 F.3d 631 (4th Cir. 2002); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

ity of the plaintiffs to recover attorneys' fees. *Id.* at 877-78.

Athens' use of *Jenkins* to suggest that the law of the Eleventh Circuit is somehow in conflict with the decision below is particularly misleading, because the petition omits a more recent and relevant Eleventh Circuit decision that actually decided the question presented. In *Dale*, 498 F.3d 1216, the Eleventh Circuit held that the FAA did *not* preclude the court from finding a class ban unconscionable under Georgia law where the class ban happened to be found in an arbitration agreement. *Dale*'s unconscionability holding was based in part on the extremely limited opportunity of the cable television subscribers in that case to recover attorneys' fees, making it "difficult for a single subscriber to obtain representation" and "allow[ing] Comcast to engage in unchecked market behavior that may be unlawful." *Id.* at 1224.

At bottom, what Athens' petition seeks to do is to transform differing outcomes concerning the enforceability of particular class bans into a conflict of federal law. But no jurisdiction has adopted a categorical rule banning *all* class action bans. The analysis is sensitive to the context and the facts and turns on differences in state law (or, where a federal remedial statute is involved, federal law). Outcomes necessarily differ. *See Muhammad*, 912 A.2d at 24 (striking down class-action ban based on a "fact-sensitive" assessment of unconscionability); *Delta Funding v Harris*, 912 A.2d 104, 115 (N.J. 2006) (explaining in a decision issued the same day that, under *Muhammad*, "a class-arbitration waiver in [an] arbitration agreement is not unconscionable per se," and upholding a waiver in a case involving large individual damages).

Because there is no conflict, this Court has repeatedly denied petitions concerning the question presented in numerous cases, including cases from California state courts and the Ninth Circuit. *See T-Mobile USA v. Laster* (No. 07-976); *Circuit City Stores, Inc. v. Gentry* (No. 07-988), *T-Mobile USA v. Lowden* (07-1330); *T-Mobile USA v. Gatton* (07-1036), and *T-Mobile v. Janda* (07-1331). The Court should do the same here.[3]

Indeed, the question presented is even less certworthy now than it was when the other petitions were denied because the lone decision that had arguably created a conflict, *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007), has been reconciled with the rest of the case law. *See Homa*, 558 F.3d at 229-30 (Third Circuit decision dismissing arguably conflicting language in *Gay* as dicta, and rejecting the notion that *Gay* stood for a "prohibition on unconscionability challenges to class-arbitration provisions").

II. THIS CASE IS A POOR VEHICLE.

Apart from the absence of any conflict, this case is a poor vehicle to explore the question presented. Indeed, Athens has not adequately demonstrated that this Court has jurisdiction over the case.

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[3] Contrary to Athens' suggestion (at 27-28), *Stolt-Nielsen v. Animalfeeds International* (No. 08-1198), currently pending before the Court, has no direct bearing on this case. The question in *Stolt* is whether class arbitration may be appropriate when the contract is silent on that question. Regardless of how the Court decides *Stolt*, however, it will not directly affect FAA preemption of state-law rulings concerning the validity of contract provisions purporting to preclude classwide treatment altogether. Accordingly, there is no reason to hold this case for *Stolt*.

1. The lower court's disposition of the case rested squarely on an independent state-law ground that is unrelated to the question presented. "If the sole problem with Athens's arbitration agreement were the class arbitration waiver," the court explained, "we would direct the trial court to strike the waiver and order the case to arbitration. But the class arbitration waiver is not the only significant problem with the parties' agreement" *Franco v. Athens Disposal Co., Inc.*, 90 Cal. Rptr.3d 539, 555 (Cal. Ct. App. 2009). Because the arbitration clause suffered from the independent defect of precluding Franco from seeking civil penalties on behalf of other employees under the Private Attorney General Act, the court concluded that the agreement as a whole was tainted with illegality and accordingly directed that the case proceed in a court of law. *Id.* at 559.

Given this independent state-law ground, Athens cannot show that a decision on the federal question would necessarily change the disposition below. Because the same judgment could have been rendered by the state court regardless of the answer to the federal question presented, review by this Court "could amount to no more than an advisory opinion" and, accordingly, jurisdiction is lacking. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *see Lynch v. New York*, 293 U.S. 52, 54-55 (1934) (jurisdiction lacking where "the ground independent of a federal question is sufficient in itself to sustain" the judgment).

2. The state court did not even discuss, let alone decide, the federal question presented by Athens' petition. This Court's general practice, under such circumstances, is to assume that jurisdiction is lacking. *See Street v. New York*, 394 U.S. 576, 582 (1969). "[W]hen the highest state court fails or refuses to pass expressly upon a fed-

eral question, the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." Gressman, et al., *Supreme Court Practice* 187-88 (9th ed. 2007); *cf. Crowell v. Randell*, 35 U.S. 368, 391 (1836) (Story, J.) ("If both of these [the raising and the deciding] do not appear on the record, the appellate jurisdiction fails.").

To be sure, Athens did present a federal-law argument in the last three pages of its petition to the California Supreme Court, but its treatment of the FAA preemption question was too cursory to satisfy the requirement of proper presentation. Athens Cal. S. Ct. Pet. 27-29; *see Adams v. Robertson*, 520 U.S. 83, 90 (1997). More importantly, Athens' state-court petition did not cite a single case from any court reaching the conclusion it urges here—namely, that the FAA preempts state-law determinations under generally applicable contract law concerning the validity of class-action bans.

In any event, even assuming that the federal question was adequately presented in the state-court petition, the California Supreme Court's general practice is to "decline to decide issues not addressed by the Court of Appeal." *Guz v. Bechtel Nat'l Inc.*, 8 P.3d 1089, 1109 (Cal. 2000). Where the state courts, according to their own practice, would not reach the federal issue under the circumstances, neither should this Court. *See Beck v. Washington*, 369 U.S. 541, 553 (1962); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945).

3. Finally, although the question was not explored in the court below, it is unclear whether the FAA even applies to this case. Respondent was employed by Athens as a truck driver, and so his employment contract is ex-

empt from the Act. *See* 9 U.S.C. § 1 (exempting from FAA's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"); *Circuit City v. Adams*, 532 U.S. 105, 119 (2001) (holding that section 1 exempts "contracts of employment of transportation workers" from the FAA); *Harden v. Roadway Package Systems, Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001) (truck drivers are exempt from FAA). Moreover, even if this Court had jurisdiction and the transportation-worker exemption were not in play, not all of the members of this Court would be able to address the question presented on its merits because the proceedings below were in state court, rather than federal court. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J, dissenting) ("I remain of the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., does not apply to proceedings in state courts.").

III. ATHENS' FAA PREEMPTION THEORY IS WRONG.

In closing, Athens claims that the decision below runs afoul of this Court's FAA jurisprudence. Pet. 29-32. That assertion, however, merely restates Athens' theory on the merits of the preemption issue—a theory that has thus far attracted no takers.

Indeed, Athens' preemption theory has been carefully considered and uniformly rejected by the state and federal appellate courts in cases such as *Shroyer*, 498 F.3d at 987-93; *Discover Bank*, 113 P.3d at 1110-17; *Scott*, 161 P.3d at 1008-09; *Kinkel*, 857 N.E.2d at 260-63; and *Muhammad*, 912 A.3d at 94-96. These decisions address this Court's cases on FAA preemption (the same cases cited at pages 9-11 and 30-32 of the petition), the FAA's policy of ensuring that arbitration agreements

stand on an equal footing with all other contracts, general principles of express and implied federal preemption, and the generally applicable nature of the state-law contract law alleged to be preempted. Neither Athens' dissatisfaction with the consensus view of state and federal courts, nor its ability to invoke snippets of this Court's cases to support its argument, amount to a conflict warranting certiorari.

As Athens acknowledges, the plain text of the FAA makes arbitration agreements enforceable "save upon such grounds as exist in law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). This Court's cases have consistently explained that the FAA requires that arbitration clauses be placed on an equal footing with all other contracts: "States may regulate contracts, including arbitration clauses, under general contract law principles" but they may not discriminate against arbitration clauses. *Casarotto*, 517 U.S. at 686. "[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 491, 492 n.9 (1987) (emphasis in original). However, a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport" with the FAA. *Id.*

The courts that have decided the question presented have adhered scrupulously to these principles. *See Shroyer*, 498 F.3d at 990 ("The California Supreme Court in *Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.") (emphasis in original). As the Washington Supreme Court explained in *Scott*, the FAA "re-

quires us to put arbitration clauses on the *same* footing as other contracts, not make them the special favorites of the law." 161 P.3d at 1008 (emphasis in original). Because the law of states such as Washington, California, Illinois, and New Jersey with respect to exculpatory clauses applies regardless of whether a class-action ban is found in an arbitration agreement or some other contract, it does not run afoul of the FAA: "The arbitration clause is irrelevant to the unconscionability." *Id.* Exculpatory clauses "do not change their character merely because they are found within a clause labeled 'Arbitration'." *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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148

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IN THE

Supreme Court of the United States

ATHENS DISPOSAL COMPANY, INC.
dba ATHENS SERVICES,

Petitioner,

v.

EDIXON FRANCO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT .	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
SUMMARY OF REPLY ARGUMENT	1
Review Should Be Granted Because This Case Is Closely Related To *Stolt-Nielsen*	3
Review Should Be Granted Because The FAA And This Court's Precedents Prohibit Selective Application Of State Law To Disfavor Arbitration	4
The FAA Requires A Uniform National Standard For Evaluating Class Waivers In Arbitration Agreements	9
This Case Squarely Presents The Issue Of Federal Preemption	12
CONCLUSION	14

TABLE OF CITED AUTHORITIES

Page

CASES

14 Penn Plaza LLC v. Pyett,
129 S. Ct. 1456 (2009) 9

Allied Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 10

Arias v. Superior Court,
46 Cal. 4th 969 (2009) 7

Banc One Acceptance Corp. v. Hill,
367 F.3d 426 (5th Cir. 2004) 8

Chindarah v. Pick Up Stix, Inc.,
171 Cal.App.4th 796 (2009) 7

Circuit City v. Adams,
532 U.S. at 112 (2001) 13

Compare Gay v. CreditInform,
511 F.3d 369 (3d Cir. 2007) 8

Discover Bank v. Boehr,
36 Cal. 4th 148 (2005) 4, 5

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 7

Gentry v. Superior Court,
42 Cal. 4th 443 (2007) 5, 6, 11, 12

Cited Authorities

Page

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 9

Green Tree Financial Corp.—Alabama v. Randolph,
531 U.S. 79 (2000) 9, 10

Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,
379 F.3d 159 (5th Cir. 2004) 8

Lowden v. T-Mobile USA, Inc.,
512 F.3d 1213 (9th Cir. 2008) 8

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 58 (1995) 7

Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 9

Murphy v. Check 'N Go of California, Inc.,
156 Cal. App. 4th 138 (2007) 6

Olvera v. El Pollo Loco, Inc.,
173 Cal. App. 4th 447 (2009) 6

Perez v. Globe Airport Security Services,
253 F.3d 1280 (11th Cir. 2001) 13

Cited Authorities

Page

Perry v. Thomas,
482 U.S. 483 (1987) 4, 6, 10

Preston v. Ferrer,
552 U.S. __, 169 L.Ed. 2d 917 (2009) 4, 6

Sanchez v. Western Pizza,
172 Cal. App. 4th 154 (2009) 6

Shroyer v. New Cingular Wireless Services, Inc.,
498 F.3d 976 (9th Cir. 2007) 5, 8

Southland Corp. v. Keating,
465 U.S. 1 (1984) 4, 10, 11

Stolt-Nielsen, et al. v. Animalfeeds International Corporation,
No. 08-0119 3

Thomas v. Perry,
200 Cal. App. 3d 510 (1988) 10

Watkins v. Wachovia Corp.,
172 Cal. App. 4th 1576 (2009) 7

STATUTES

9 U.S.C. § 2 4

Cited Authorities

Page

SCHOLARLY AUTHORITIES

Broome, *An Unconscionable Application Of The Unconscionability Doctrine: How The California Courts Are Cirumventing The Federal Arbitration Act*, 3 *Hastings Business Law Journal* 39 (2006) .....

Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, *2005 J. Disp. Resol. 61 (2005)* 5

SUMMARY OF REPLY ARGUMENT

Respondent attempts to dissuade this Court from granting review in this case by advancing a number of flawed legal contentions

First, Respondent argues that the conflict between the California courts and the majority of federal courts, a conflict noted by numerous legal commentators, is but an illusion. Respondent posits that this conflict can be harmonized, because the cases which invalidate arbitration agreements with class waivers involve the application of *state* law unconscionability principles, while the cases which enforce class waivers involve *federal* statutory claims and eschew unconscionability analysis.

This argument vividly illustrates exactly why review is necessary. Those state and federal courts that are intent on invalidating class action bars in arbitration agreements rely on a perversion of the unconscionability doctrine as a subterfuge to avoid FAA preemption. In contrast, the majority of federal courts, which enforce class waiver provisions, reject the notion that arbitration is an inferior forum for vindicating statutory rights or that class arbitration bars are *per se* "unconscionable."

Respondent argues the FAA does not preempt California's rule invalidating arbitration agreements which bar class actions because that rule is purportedly arbitration neutral. This contention is a non-sequitur. *Only* arbitration agreements can preclude class procedures in arbitration. California has *only* applied its public policy favoring class actions to invalidate

arbitration agreements. The minority of court decisions, cited by Respondent, pointedly illustrate the need for this Court to grant review and reaffirm that state laws which disfavor arbitration agreements are preempted by the FAA.

The decision below, if not reviewed and corrected, creates an absurd dichotomy in which the validity of class action waivers in FAA covered agreements will depend on the fortuity of what court hears the case. California courts and the Ninth Circuit should not be permitted to insulate their attack on arbitration from preemption merely by the talismanic invocation of the word "unconscionable." This brand of unconscionability analysis is not applicable to contracts generally, but instead invalidates only arbitration agreements. The FAA plainly forbids this.

Second, Respondent incorrectly contends this case is a poor vehicle for reviewing this important federal question. Because no state law policy applicable to a subset of agreements (employment arbitration agreements) or types of disputes (wage and penalty claims under the California Labor Code) is exempt from the effect of the FAA, there cannot be any "independent state law grounds" upon which to uphold the decision of the court below. Respondent's further arguments regarding jurisdiction under the FAA or preservation of the federal issue on appeal are contradicted by the record.

Review Should Be Granted Because This Case Is Closely Related To *Stolt-Nielsen*

On December 9, this Court heard argument on the question whether, consistent with the FAA, class arbitration may be imposed on parties whose arbitration clauses are silent on that issue. *Stolt-Nielsen, et al. v. Animalfeeds, International Corporation*, No. 08-0119. During argument, Justice Ginsburg asked respondent's counsel the precise question directly posed by Athens' Petition:

> Let's assume that you prevail in this case . . . I would assume that the tankers are now going to add to their contract, as many contracts do, a provision saying no class action. . . . If the arbitration agreement says – agreed to arbitrate any and all disputes but you may not proceed on behalf of a class, would that preclude you from bringing a class action anyway?

Transcript, p. 56, ln. 17-24.

This case presents that very question—whether the FAA requires a court to enforce an arbitration agreement that expressly bars class arbitration—in a context where the class action waiver does not act as an exculpatory clause or otherwise preclude the vindication of statutory rights. Because this case presents an opportunity to immediately resolve an issue that naturally flows from *Stolt-Nielsen* review is plainly warranted.

Review Should Be Granted Because The FAA And This Court's Precedents Prohibit Selective Application Of State Law To Disfavor Arbitration

The decision of the court below conflicts directly with this Court's decisions holding that state-law policies which do not apply generally to "any contract" may not preclude enforcement of the terms of an agreement to arbitrate. 9 U.S.C. § 2.[1] This Court's decisions hold that state laws of particular application to arbitration, whether of legislative or judicial origin, do not provide a basis for refusing to enforce agreements to arbitrate. *Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 11 (1984); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) *Preston v. Ferrer*, 552 U.S. __, 169 L.Ed.2d 917, 925 (2009).

California, however, has flouted this federal policy. California decisions indicate a judicial unwillingness to enforce arbitration agreements deemed to conflict with California's public policy favoring class actions. In the seminal decision of *Discover Bank v. Boehr*, 36 Cal. 4th 148 (2005), a sharply divided California Supreme Court rejected the argument that the FAA precluded the State from imposing classwide arbitration upon parties who had agreed to only individual arbitration. Trying to avoid

[1] For an empirical analysis of California's discriminatory application of "unconscionability" to invalidate arbitration agreements more than five times more frequently than other contract provisions, *see* Broome, *An Unconscionable Application Of The Unconscionability Doctrine: How The California Courts Are Cirumventing The Federal Arbitration Act*, 3 *Hastings Business Law Journal* 39 (2006)(concluding that "the California courts are clearly biased against arbitration as an alternative means of dispute settlement").

preemption, the *Discover Bank* majority invoked the doctrine of unsconsionability, and limited its application to arbitration clauses which amounted to exculpatory clauses because of the necessarily small amounts involved in the underlying consumer claims. *Id.* at 160-163. The Ninth Circuit has adopted this position. *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007).

This inexorable expansion of a judicially declared public policy favoring class actions over the express terms of parties' arbitration agreements continued when the sharply divided California Supreme Court dropped any pretense that the policy favoring class actions was limited to only claims involving small amounts of money. *Gentry v. Superior Court*, 42 Cal. 4th 443, 458 (2007). In doing so, the California Supreme Court also untethered its analysis from anything resembling traditional unconscionability analysis.[2] The public policy favoring classwide arbitration morphed from a prohibition on exculpatory clauses into an inquiry whether class arbitration might be "significantly more effective practical means of vindicating the rights of the affected employees than individual [ ] arbitration" regardless of the actual ability of such employees to vindicate their individual statutory rights in the arbitral forum. *Id.* at 463.

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[2] Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61 (2005).

This case represents the logical conclusion of the trend. Since *Gentry* all published decisions involving wage and hour claims under the California Labor Code have refused to enforce arbitration agreements containing class action waiver provisions. Appendix A; *Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138 (2007); *Sanchez v. Western Pizza*, 172 Cal. App. 4th 154 (2009); *Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th 447 (2009). In effect the California courts have imposed a *per se* rule invaliditating class waivers in arbitration agreements as applied to claims under the Labor Code. The judicial public policy favoring class action treatment for wage claims has, under the rubric of unconscionability, been used to justify invalidation of arbitration agreements. This Court forbade such circumvention of the FAA based on State policy in *Perry* and *Preston*.

The California decisions are based on the faulty premise that courts are free to rewrite arbitration agreements as long as they invoke a doctrine of general applicability, like unconscionability. But the selective use of such doctrines to invalidate class action bars in arbitration agreements reflects a state policy mandating a particular type of arbitration procedure *notwithstanding* the contracting parties' wishes. This is doubly apparent here, where the trial court determined that the arbitration provision did not exculpate Athens from any potential substantive liability to Franco under the Labor Code. Appendix B, 45a ("Defendant's Mutual Arbitration Policy does not in any

way disadvantage employees who pursue claims in individual arbitrations").[3]

The FAA does not permit States to trample on arbitration rights through the charade of pretending to apply a general doctrine like unconscionability. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996); *Mastrobuono*, *supra*, 514 U.S. at 58. What matters is not the label placed on the state policy, but whether that law or policy is specific to arbitration. Were the law otherwise, States would be free to thwart arbitration by simply calling some disfavored arbitration provision "unconscionable."

California courts allow waivers of class action claims under general contract law outside of arbitration agreements. *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009) (affirming validity of individual settlement agreement disposing of putative class claims); *Watkins v. Wachovia Corp.*, 172 Cal. App. 4th 1576, 1588-1592 (2009)(dismissing putative class representative's appeal based on her agreement to settle her individual claims). Respondent is unable to point to any California case invalidating a class action waiver contained in a non-arbitration contract.

The reason is obvious. *Only* arbitration agreements specify whether or not class claims and procedures are permissible or precluded in arbitration. Requiring class

[3] The trial court found Franco could pursue Labor Code Private Attorney General Act ("PAGA") claims in arbitration. PAGA claims do not require class action procedures. *Arias v. Superior Court*, 46 Cal. 4th 969, 975 (2009).

action procedures in arbitration is not an "arbitration neutral" rule of general applicability, but is rather an arbitration specific rule designed to rewrite or invalidate only a single kind of contract—the very kind that the FAA was written to protect.

California's judicial foray into subverting the dictates of the FAA under the cloak of unconscionability has spilled over into the federal courts, creating a split of authority among the circuits. *Compare Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007) (rejecting the argument that Pennsylvania unconscionability law was insulated from further scrutiny under the FAA and explaining that state-law "unconscionability" rules are preempted when they "rel[y] on the uniqueness" of an arbitration provision); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) ("Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny."); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 432 (5th Cir. 2004) (same); with *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, at 1221 n.3 (9th Cir. 2008) (expressly declining "to follow the holding in *Gay*."); *Shroyer, supra*, 498 F.3d 976.

Respondent cites eight State Supreme Court decisions from jurisdictions outside California that also invoke principles of state contract law to strike down arbitration agreements with class action waivers. But these cases in fact point to the very reason why this Court should grant review—other jurisdictions are now following California's example of how to skirt the FAA.

The FAA Requires A Uniform National Standard For Evaluating Class Waivers In Arbitration Agreements

The decision below is based on an unfounded distrust of arbitration as a forum for California Labor Code claims.

This Court has repeatedly condemned judicial suspicion of arbitration as an inferior forum, stating "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; . . . objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory [ ] claims." *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470-1472 (2009).

In a trilogy of cases this Court has developed the sole test that is to be used in determining whether a particular arbitral forum is unsuitable for resolving statutory claims. *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 637 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79, 90 (2000). In *Randolph*, this Court reiterated the standard that "so long as a prospective litigant effectively may vindicate [his or her] statutory causes of action in the arbitral forum, the statute [FAA] serves its functions." 531 U.S. at 90. *Randolph* rejected as too "speculative" and unsupported by evidence the plaintiff's argument that large arbitration costs might preclude the plaintiff from arbitrating her individual claim and vindicating her

statutory rights. The Court held that "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* 531 U.S. at 522-523.

These decisions reflect the yardstick by which to measure the sufficiency of any arbitral forum under the FAA—whether it permits a party to vindicate his statutory rights. If he can do so, the arbitration agreement cannot, by definition, be unconscionable.

The FAA was enacted to provide a uniform nationwide law. This is so because federal case law under the FAA constitutes a body of substantive law on the enforceability of arbitration agreements. *Southland, supra*, 465 U.S. at 12; *Perry, supra*, 482 U.S. at 489. The FAA and the case law interpreting it preempt and displace contrary state law, legislative or judicial. *Southland, supra*, 465 U.S. at 10; *Perry, supra*, 482 U.S. at 490 ("The FAA's displacement of conflicting state law is 'now well established.'"). This preemption takes place because "Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases." *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995)

Where the federal substantive law under the FAA has determined that a particular type of arbitration provision is enforceable, California courts cannot refuse to enforce such provisions, even if state law would require otherwise. *Thomas v. Perry*, 200 Cal. App. 3d 510, 514-515 (1988) (". . . we must determine whether the arbitration clause would be held unconscionable and unenforceable as a matter of *federal* law."). State courts

and federal courts should reach identical results under the FAA and the federal substantive law of arbitrability when confronted with identical arbitration provisions. The alternative is chaos.

Conflict and confusion in the law promote inconsistency and unfairness and "encourage and reward forum shopping." *Southland*, *supra*, 465 U.S. at 15. Without a uniform nationwide standard, the determination whether class arbitration may be mandated by a court will turn on the happenstance of geography, rather than on the intent of the parties expressed in the terms of their arbitration agreements. A uniform body of federal law is vital because the same arbitration agreements often apply to nationwide employers and other businesses. The absence of a uniform national standard will foster geographic forum shopping and forum shopping between federal and state courts. Review should be granted to provide a uniform standard on the issue of whether express class arbitration waivers in arbitration agreements are enforceable, and what a party seeking to prevent enforcement of such an agreement must prove under the FAA.

The court below did not find that the procedures in arbitration would interfere with Respondent's ability to individually vindicate his statutory rights, yet it reached a result that conflicts with federal cases that have enforced substantially identical class action bars. The decision below, based on the *Gentry* view that a California's judicial affinity for class procedures trumps the FAA's policy that arbitration agreements be enforced in accordance with their terms, applied a generalized

suspicion of arbitration and state parochial concerns about efficiency of enforcement of state statutes to outweigh the federal statutory requirement that required enforcement of the parties' arbitration agreement in accordance with its terms. The decision below was plainly wrong in failing to apply federal substantive law under the FAA and refusing to enforce the individual arbitration requirement in the agreement.

This Case Squarely Presents The Issue Of Federal Preemption

The trial court correctly determined that the FAA applied. Appendix B at 45a. That determination was not challenged by Respondent on appeal. Appendix A at 4a. Athens raised the FAA preemption issue at each stage of the proceedings and preserved the issue on appeal. As the Court of Appeal noted: "Athens made a straightforward argument: Under the FAA, arbitration was mandatory." Appendix A at 5a.

Although the issue was raised by Athens at each stage of the proceedings, neither the Court of Appeal nor the California Supreme Court specifically addressed the FAA question in this case. State courts cannot insulate themselves from review of federal law questions by mere silence. The court below relied upon *Gentry*, where California's Supreme Court expressly rejected the argument that the FAA prohibited the court from rewriting the parties' contract to require class arbitration. *Gentry*, 42 Cal. 4th at 462-463. Thus, the Court of Appeal's reliance on *Gentry*, to the exclusion of and contrary to federal law, squarely presents the issue of FAA preemption.

Respondent briefly suggests that it is "unclear whether the FAA even applies to this case." After conceding that this issue was not preserved by Respondent in the trial court or on appeal, Respondent nevertheless argues that he was exempt from the FAA under Section 1, even though he was employed solely as a local trash truck driver. The exemption, however, is narrowly construed, and does not extend either to local intrastate drivers or to trash, which by definition has left the stream of commerce and is headed to the dump. *Circuit City v. Adams*, 532 U.S. at 112, 117 (2001) (employees not engaged in the actual interstate movement of goods in the flow of commerce are not excluded from the FAA); *Perez v. Globe Airport Security Services*, 253 F.3d 1280, 1283-84 (11th Cir. 2001). Because Respondent's argument was waived in the courts below and no evidence was presented that Respondent himself transported goods across state lines and in the flow of commerce, there is no basis to find Respondent exempt from the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 09-272

In the
Supreme Court of the United States

ATHENS DISPOSAL COMPANY, INC.
dba ATHENS SERVICES,
Petitioner,

v.

EDIXON FRANCO,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the Second District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND RALPHS GROCERY COMPANY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2, Pacific Legal Foundation (PLF) and Ralphs Grocery Company respectfully request leave of the Court to file this brief amicus curiae in support of the Petitioner.[1] All parties were notified of Amicus's intention to file this brief more than ten days before the due date. Written consent was granted by counsel for Petitioner and is lodged with the Clerk of this Court. Counsel for Respondent refused to respond to repeated requests for consent, thus necessitating this motion.

INTEREST OF AMICI CURIAE

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, Docket No. 08-1198, *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008), and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006). Because of its expertise with regard to the freedom of contract in the arbitration context, as well as its commitment to economic freedom, PLF believes its perspective will aid this Court in considering whether to grant the petition for writ of certiorari in this case.

Ralphs Grocery Company runs more than 400 supermarkets under the Ralphs, Food 4 Less, and Foods Co. banners, mostly in California but also in Illinois, Indiana, and Nevada. The company also runs warehouse-style stores under the Food 4 Less and Foods Co banners. Ralphs Grocery Company has approximately 35,000 employees, including substantial numbers in California. Ralphs asks its employees, including those in California, to agree to resolve employment-related disputes in arbitration, and therefore has a substantial interest in this Court's review of the decision below.

For the foregoing reasons, the motion of Pacific Legal Foundation and Ralphs Grocery Company to file a brief amicus curiae should be granted.

DATED: October, 2009.

Respectfully submitted,

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QUESTION PRESENTED

Whether the federal arbitration act, 9 U.S.C. § 1, *et seq.*, prohibits a court from invalidating an express class action bar in an arbitration agreement because the court finds that class arbitration is more efficient, where the class action bar does not preclude the plaintiff from vindicating his statutory rights through an individual arbitration.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION 2

ARGUMENT 3

I. CALIFORNIA'S UNCONSCIONABILITY DOCTRINE UNIQUELY DISFAVORS ARBITRATION CONTRACTS 3

II. CALIFORNIA COURTS REQUIRE MUTUALITY IN ARBITRATION CONTRACTS, BUT NOT OTHER TYPES OF CONTRACTS 9

III. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE FAA VALUES FREEDOM OF CHOICE OVER JUDICIAL "EFFICIENCY" 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

A & M Produce Co. v. FMC Corp.,
135 Cal. App. 3d 473 (1982) 8

Advance-Rumely Thresher Co., Inc. v. Jackson, 287 U.S. 283 (1932) 3-4

Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995) 7

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Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) 2

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2 Cal. App. 4th 76 (1991) 14

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) 5

Cingular Wireless, LLC v. Mendoza,
547 U.S. 1188 (2006) 1

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128 S. Ct. 1743 (2008) 1

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532 U.S. 105 (2001) 19

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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

Hall Street Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008) 1

Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3d Cir. 1999) 12

Hess Collection Winery v. Cal. Agric. Labor Relations Bd., 140 Cal. App. 4th 1584 (2006) . . . 4

Hillsman v. Sutter Cmty. Hosp., 153 Cal. App. 3d 743 (1984) 13

Ilkhchooyi v. Best, 37 Cal. App. 4th 395 (1995) . . . 14

In re Pate, 198 B.R. 841 (S.D. Ga. 1996) 13

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Kim v. Francesca's Collections of Cal., Inc., No. B207572, 2009 WL 1016599 (Cal. Ct. App. Apr. 16, 2009) 8

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Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 18

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TABLE OF AUTHORITIES—Continued

Page

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156 Cal. App. 4th 138 (2007) 8

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No. A089871, 2001 WL 1324778
(Cal. Ct. App. Oct. 29, 2001) 14

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& Smith, Inc., 7 F.3d 1110 (3d Cir. 1993) 5

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No. CV-F-008-601, 2008 WL 2523368
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Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959) 17

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2009 WL 975457 (N.D. Cal. Apr. 10, 2009) 12

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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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Page

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INTEREST OF AMICI CURIAE

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, Docket No. 08-1198, *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048 (2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008), and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006). Because of its expertise with regard to the freedom of contract in the arbitration context, as well as its commitment to economic freedom, PLF believes its perspective will aid this Court in considering whether to grant the petition for writ of certiorari in this case.

Ralphs Grocery Company runs more than 400 supermarkets under the Ralphs, Food 4 Less, and

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Foods Co. banners, mostly in California but also in Illinois, Indiana, and Nevada. The company also runs warehouse-style stores under the Food 4 Less and Foods Co. banners. Ralphs Grocery Company has approximately 35,000 employees, including substantial numbers in California. Ralphs asks its employees, including those in California, to agree to resolve employment-related disputes in arbitration, and therefore has a substantial interest in this Court's review of the decision below.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), this Court reaffirmed that Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, to overcome judicial resistance to arbitration and that the savings clause of Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts. Applying this federal substantive law to the states, this Court held that arbitration contracts are to be construed as any other contract, not subjected to more stringent review or disfavor because the subject matter is arbitration. The Court thus confirmed the holding of *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

These matters have been settled law for 25 years. California courts, however, still scrutinize arbitration with suspicion and dislike, and invalidate arbitration contracts with distressing regularity. Most commonly, California courts invoke unconscionability principles to invalidate the contracts. However, the unconscionability doctrine is not applied neutrally among all

types of contracts, resulting in the disproportionate invalidation of arbitration provisions as opposed to other contracts. This feature of California jurisprudence interferes with the normal and proper functioning of the California marketplace, injuring businesses and consumers alike. Because employment contracts—including arbitration clauses—are ubiquitous throughout California, and because California courts are invalidating arbitration clauses at a rate far exceeding that of any other state, this case presents an important question that can be resolved only by this Court. The petition for writ of certiorari should be granted.

ARGUMENT

I

CALIFORNIA'S UNCONSCIONABILITY DOCTRINE UNIQUELY DISFAVORS ARBITRATION CONTRACTS

California's reluctance to enforce arbitration contracts conflicts with the FAA's policy of favoring arbitration. It also conflicts with the approach of other states and the federal circuit courts, which comply with the federal policy codified in the FAA. Because California's hostility toward arbitration contracts affects many millions of employees and businesses in the country's most populous state, this Court should grant the writ of certiorari to review and reverse the decision below.

This Court has recognized that the freedom to make and enforce contracts is a fundamental element of free choice and ought to be protected for that reason. *See, e.g., Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) ("[F]reedom of

contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."). With one procedurally bizarre and narrow exception, there is no statute in California, or any other state, that requires parties to a transaction to arbitrate disputes.[2] Nonetheless, arbitration frequently is described as "mandatory," by which those who oppose arbitration contracts generally mean either that (1) individuals must agree to arbitration if they wish to buy the product or continue being employed; or (2) by agreeing to arbitrate, the contract "mandates" individuals to resolve disputes by arbitration even if they later would prefer to go to court. Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 706 (2001). This Court, however, has refused to invalidate arbitration agreements solely on the grounds that an individual must take-it-or-leave-it. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the

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[2] *See Hess Collection Winery v. Cal. Agric. Labor Relations Bd.*, 140 Cal. App. 4th 1584, 1600-01 (2006) (upholding validity of Cal. Labor Code § 1164, mandating "interest" arbitration (as opposed to "grievance" arbitration) between agricultural employer and workers, which compels the parties to submit to mediation imposing a collective bargaining agreement when the parties fail to agree on the terms of an initial bargaining agreement).

employment context.");[3] *see also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118 (3d Cir. 1993) (arbitration agreements are enforceable even if they involve unequal bargaining power). *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (upholding a forum-selection clause in cruise-line ticket).

One way that individuals seek to evade an arbitration provision in a contract is to invoke the unconscionability doctrine. Unconscionability is a notoriously flexible concept. *See* Joseph M. Perillo, *Corbin on Contracts: Avoidance & Reformation* § 29.1 (rev. ed. 2002) ("Unconscionability is one of the most amorphous terms in the law of contracts."). The flexibility no doubt stems from the original purpose of the unconscionability doctrine: to protect consumers. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & Econ. 293, 302 (1975) ("Ideally, the unconscionability doctrine protects against fraud, duress and incompetence, without demanding specific proof of any of them."). However, the doctrine was not

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[3] In 2002, Senator Edward Kennedy introduced a bill expressly to restrict the FAA to nonemployment agreements. S. 2435, 107th Cong. (2002) ("A bill to amend title 9 of the United States Code to exclude all employment contracts from the arbitration provisions of chapter 1 of such title; and for other purposes."), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN02435:@@@L&summ2=m& (last visited Sept. 16, 2009). This bill has since been reintroduced and referred to committee five times, but never made it out of committee. *See, e.g.*, H.R. 2969, 109th Cong. (2005) ("Preservation of Civil Rights Protections Act of 2005 – Amends the Federal Arbitration Act to modify the definition of commerce so as to exclude employment contracts from arbitration provisions"), bill history *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR02969:@@@L&summ2=m& (last visited Sept. 16, 2009).

written to enable courts to do justice by rewriting contracts. In fact, in the official comments to Uniform Commercial Code § 2-302 (2003), the drafters explained that the unconscionability principle "is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." *See id.*, official comment 1 (emphasis added); *accord* Cal. Civ. Code § 1670.5, Legis. Comm. Cmt. (same).

While the FAA permits state courts to apply "ordinary principles of unconscionability," the FAA forbids state courts from implementing substantive state policies that undermine arbitration clauses. Moreover, "a state cannot evade FAA preemption simply by labeling procedures which are inconsistent with its substantive policies as unconscionable." Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements*, 58 Bus. Law. 1289, 1295 (2003). Similarly, this Court's arbitration jurisprudence does not permit a state to use unconscionability as a ground for voiding arbitration agreements in certain classes of disputes just because the state court believes those disputes are better handled by some other means of dispute resolution. For example, this Court held that the FAA preempts California Labor Code § 229 insofar as the state statute allowed litigation in court to collect wages "without regard to the existence of any private agreement to arbitrate." *Perry v. Thomas*, 482 U.S. 483, 484, 491 (1987) (quoting Cal. Lab. Code § 229 (West 1971)). This strongly suggests that California could not simply deem such an arbitration clause to be unconscionable and unenforceable to the extent it

prevented an employee from suing in court to collect unpaid wages. *See Gold Rush*, 58 Bus. Law. at 1295. As one commentator noted:

> [T]he United States Supreme Court surely would review state courts' unconscionability rulings to the extent necessary to prevent the unconscionability doctrine from effectively nullifying the FAA with respect to a huge class of contracts. Indeed, the Court has twice stated that state courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."

Stephen J. Ware, *Alternative Dispute Resolution* § 2.25(b), at 58 (West 2001) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 n.3 (1996)); *Perry*, 482 U.S. at 492 n.9. That is, a court may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

Nonetheless, California courts have found the unconscionability doctrine to be a valuable tool to invalidate arbitration contracts. In so doing, California has developed a deserved reputation as "hostile" to arbitration. A recent empirical analysis conducted by Stephen Broome revealed that unconscionability challenges in California succeed against arbitration provisions with far greater frequency than any other type of contract provision. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California*

Courts Are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L. J. 39 (2006). Broome identified 114 cases in which the California Courts of Appeal considered the unconscionability of arbitration contracts; in fifty-three of those cases, the arbitration provision was held unconscionable and unenforceable and another thirteen found some aspect of the arbitration provision to be unconscionable and severed it. *Id.* at 44-45.[4] Forty-eight cases upheld the arbitration contract. By way of contrast, of the forty-six unconscionability claims made outside the context of arbitration, forty-one of the contracts were upheld by the courts, while only five were struck down as unconscionable. *Id.* at 47. By targeting arbitration provisions for exceptionally harsh review under the unconscionability doctrine, California courts violate Section 2 of the FAA, which demands that arbitration contracts be considered on "equal footing" with any

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[4] Broome's survey included cases decided from 1982 to 2006. The starting date was set by California's adoption of the currently existing unconscionability doctrine in *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982). Broome, 3 Hastings Bus. L.J. at 44 n.33. Since then, court invalidation of arbitration clauses on grounds of unconscionability has, if anything, accelerated. *See Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th 447, 457 (2009); *Kim v. Francesca's Collections of Cal., Inc.*, No. B207572, 2009 WL 1016599, at *5 (Cal. Ct. App. Apr. 16, 2009); *Sanchez v. W. Pizza Enters., Inc.*, 172 Cal. App. 4th 154, 181 (2009); *Duran v. Discover Bank*, No. B203338, 2009 WL 1709569, at *7 (Cal. Ct. App. June 19, 2009); *Fuentes v. Rent-A-Center, Inc.*, No. A121673, 2009 WL 2351605, at *11 (Cal. Ct. App. July 31, 2009); *Tourangeau v. LBL Ins. Servs., Inc.*, No. G038637, 2008 WL 1952377, at *4 (Cal. Ct. App. May 6, 2008); *Stiglich v. Jani-King of Cal., Inc.*, No. D051811, 2008 WL 4712862, at *11 (Cal. Ct. App. Oct. 28, 2008); *Murphy v. Check 'N Go of Cal., Inc.*, 156 Cal. App. 4th 138, 149 (2007). No California court since *Gentry* has upheld an arbitration agreement against a claim of unconscionability.

other contract. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 36.

II

CALIFORNIA COURTS REQUIRE MUTUALITY IN ARBITRATION CONTRACTS, BUT NOT OTHER TYPES OF CONTRACTS

What accounts for the difference in the courts' willingness to invalidate arbitration contracts as unconscionable as opposed to contracts in other contexts? Mostly, the culprit is a special test that California courts apply to unconscionability claims brought only against arbitration contracts. This test—the "mutuality test"—first appeared in *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997), in which the court held that a contract that requires one party to arbitrate but not the other is so "one-sided" as to be unconscionable. *Id.* at 1532. The *Stirlin* court repeatedly labeled the contract between the parties as a "contract of adhesion," with the assumption that the label would be dispositive of the legal issues. *Id.* at 1533; *see also Kinney v. United Healthcare Servs.*, 70 Cal. App. 4th 1322, 1332 (1999) (invalidating "unilateral obligation to arbitrate"). Yet this disdain of adhesion contracts itself betrays a certain bias.

> "The contract of adhesion is a part of the fabric of our society. It should neither be praised nor denounced . . . ." That is because there are important advantages to its use despite its potential for abuse. These advantages include the fact that standardization of

> forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations, and that the drafter can rationally calculate the costs and risks of performance, which contributes to rational pricing.

Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007, 1015 (M.D. Ala. 1997) (citing *Roberson v. The Money Tree of Alabama, Inc.*, 954 F. Supp. 1519, 1526 n.6 & n.10 (M.D. Ala. 1997)).[5]

None of those advantages were even acknowledged by the California Supreme Court, however, and that court adopted the mutuality test in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th

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[5] Richard Epstein explains why the "mutuality argument" cannot be a legitimate basis for declaring a contract unconscionable:

> A could not complain if B decided not to make him any offer at all; why then is he entitled to complain if B decides to make him *better off* by now giving him a choice when before he had none? If A does not like B's offer, he can reject it; but to allow him to first accept the agreement and only thereafter to force B to work at a price which B finds unacceptable is to allow him to resort (with the aid of the state) to the very form of duress that on any theory is prohibited. There is no question of "dictation" of terms where B refuses to accept the terms desired by A. There is every question of dictation where A can repudiate his agreement with B and hold B to one to which B did not consent; and that element of dictation remains even if A is but a poor individual and B is a large and powerful corporation. To allow that to take place is to indeed countenance an "inequality of bargaining power" between A and B, with A having the legal advantage as he is given formal legal rights explicitly denied B.

Epstein, *supra*, at 297.

83, 117 (2000), announcing that arbitration agreements must contain a "modicum of bilaterality." Since *Armendariz*, more than two-thirds of the courts that invalidated arbitration provisions did so because the provisions lacked mutuality. Broome, 3 Hastings Bus. L.J. at 50-51; *see also* Michael Schneidereit, Note, *A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 Hastings L.J. 987, 1002 (2004) ("[I]n *Armendariz*, the court honed California unconscionability law into a weapon that could be used against mandatory arbitration agreements."). Indeed, in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), the California Supreme Court employed a form of the mutuality test to strike down class-arbitration waivers. In the court's view:

> [C]lass action or arbitration waivers are indisputably one-sided. "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits."

Id. at 161 (quoting *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002), *cert. denied*, 537 U.S. 1226 (2003)). The court in *Gentry* also relied on what it perceived as the one-sided nature of the contract in striking down Circuit City's class-arbitration waiver. *Gentry v. Superior Court*, 42 Cal. 4th 443, 470-72 (2007). Although some language in *Armendariz* suggests that lack of mutuality can be justified by "business realities," *Armendariz*, 24 Cal. 4th at 117, no

lower California court has yet identified a business reality sufficient to justify lack of mutuality in an arbitration agreement. Broome, 3 Hastings Bus. L.J. at 54, citing Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 81 (2005).[6] The mutuality test thus makes it significantly easier to challenge arbitration agreements as unconscionable.

Yet this Court held that "[t]he 'goals and policies' of the FAA . . . are antithetical to threshold limitations placed specifically and solely on arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 688. Given this straightforward holding, jurisdictions other than California have been unwilling to adopt a requirement of mutuality for arbitration agreements. *See, e.g., McNaughton v. United Health Care Servs. Inc.*, 728 So. 2d 592, 599 (Ala. 1998) (a mutuality approach relies on the "uniqueness of the concept of arbitration," "assigns a suspect status to arbitration agreements," and therefore "flies in the face of *Doctor's Associates*"). *See also Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) ("[S]ubstantive federal law stands for the proposition that parties to an arbitration agreement need not equally bind each other with respect to an arbitration

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[6] Some federal district courts, applying California law, will occasionally find that the mutuality requirement was met and uphold an arbitration agreement. *See Rutter v. Darden Restaurants, Inc.*, No. CV-08-6106, 2008 WL 4949043, at *9 (C.D. Cal. Nov. 18, 2008); *Rodriguez v. Sim*, No. C-08-3982, 2009 WL 975457, at *9-*10 (N.D. Cal. Apr. 10, 2009); *Ramirez-Baker v. Beazer Homes, Inc.*, No. CV-F-008-601, 2008 WL 2523368, at *6-*7 (E.D. Cal. June 20, 2008).

agreement if they have provided each other with consideration beyond the promise to arbitrate."); *In re Pate*, 198 B.R. 841, 844 (S.D. Ga. 1996) (same result under Georgia law); *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001) ("[T]he doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined.").

Meanwhile, outside the arbitration context, California courts do not demand mutuality either. *See Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1488-89 (1998) (unilateral mortgage agreement upheld because "[w]here sufficient consideration is present, mutuality is not essential"); *Hillsman v. Sutter Cmty. Hosp.*, 153 Cal. App. 3d 743, 752 (1984) (upholding unilateral employment contract where consideration requirement is properly met; a "mutuality of obligation" is unnecessary). Thus, California's "mutuality" approach to determining substantive unconscionability in arbitration provisions differs from the standard used to analyze ordinary contractual provisions for unconscionability. Under the mutuality test, the court relies on its own speculation that the arbitral proceeding itself might impede a party's ability to obtain the requested relief. In *Gentry*, the court went even further, speculating that unidentified other potential class members might find it difficult to assert their rights. *Gentry*, 42 Cal. 4th at 461 ("Some workers, particularly immigrants with limited English language skills, may be unfamiliar with the overtime laws. Even English-speaking or better educated employees may not be aware of the nuances of overtime laws with

their sometimes complex classifications of exempt and nonexempt employees.") (citation omitted).

For nonarbitration contractual provisions, California courts invalidate contracts as unconscionable only upon evidence of measurable, inevitable hardship if the disputed term is enforced. *See Phoenix Leasing Inc. v. Johnson*, No. A089871, 2001 WL 1324778, at *6 (Cal. Ct. App., Oct. 29, 2001) (invalidating provision that would have given lender $208,000 of unaccrued interest); *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 411 (1995) (invaliding landlord's attempt to appropriate a portion of the sale price of a lease); *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 83 (1991) (invalidating interest rate of 200% per annum on a secured $99,000 loan); *Ellis v. McKinnon Broadcasting Co.*, 18 Cal. App. 4th 1796, 1806 (1993) (invalidating contract that gave employer all of employee's sales commissions (which were the employee's sole compensation) that were received after the employee left the company when the sales were generated by the employee prior to his voluntary departure); *Johnisee v. Kimberlite Corp.*, No. A107341, 2005 WL 1249198, at *8 (Cal. Ct. App. May 24, 2005) (same).[7]

Because such class action waivers are upheld in most other courts, consumers who wish to sue national corporations (and their counsel) can circumvent those waivers by the simple mechanism of initiating a class

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[7] These five cases are the only ones identified by Stephen Broome where California appellate courts invalidated contracts as unconscionable outside the arbitration context. *See* Broome, 3 Hastings Bus. L.J. at 56-58. *See also Dalis v. Reinhard*, No. H031637, 2009 WL 932650, at *17-*18 (Cal. Ct. App. Apr. 18, 2009) (upholding nonrecourse provision of a promissory note).

action lawsuit in California. They need only to find a plaintiff in California to take the lead and file suit in state court, and then, once the lawsuit is under way, broaden the class action to include plaintiffs from around the country. *See* Aaron C. Gundzik & Rebecca Gilbert Gundzik, *Will California Become the Forum of Choice for Attacking Class Action Waivers?*, 25 Franchise L.J. 56, 59 (2005). Thus, although California consumers and businesses are most obviously affected by the California courts' refusal to enforce class action waivers in arbitration, the true impact is national in scope and warrants this Court's review.

III

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE FAA VALUES FREEDOM OF CHOICE OVER JUDICIAL "EFFICIENCY"

Relying on *Gentry*, the court below placed a very high value on the efficiency of resolving the wage-and-hour disputes on a classwide basis. *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277, 1299 (2009) ("[C]lass treatment would be more practical than individual actions, regardless of whether the claims are adjudicated through arbitration or in the trial court."). But this Court has observed that freedom of choice, and not efficiency concerns, animates the Federal Arbitration Act. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (FAA was designed "first and foremost . . . to enforce agreements into which parties had entered, and we must not . . . allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.").

Where a court coerces contracting parties to act in a way outside their agreement, it makes no sense to speak of this as economically efficient. Coercive policies deprive the contracting parties of their judgment, to benefit outsiders, whose goals are thereby deemed more worthy. But if the desires of the contracting parties are to be disregarded, then the determination of whether a decision is efficient for those parties is unnecessary and senseless. What attorney Roger L. Carter writes of coercion in mediation is equally true of any form of coercive arbitration:

> If a party is not free to make a small offer—or no offer at all—in mediation, that party has lost, rather than gained, autonomy . . . . Judges must recognize that the parties—not the court—own the dispute.
>
> . . . .
>
> Any contrivance that works against this right deserves condemnation. . . . [W]e err if we see docket clearing as a primary goal of any form of ADR. Mediation processes should be designed to improve the quality of settlements. Any attendant increase in the quantity of settlements ought to be seen as a secondary benefit.

Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. Disp. Resol. 367, 395. Prioritizing the political goal of increased quantity of dispute resolutions over the litigants' own interest in the quality of those resolutions jettisons the desires of the litigants

themselves, and thus cannot qualify as economically efficient.

The Second Circuit's resolution of *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), was therefore correct and instructive here. In that case, the court overruled *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975), which had allowed arbitration cases to be consolidated despite the failure of the parties to agree to such a procedure. The *Nereus* court held that this was justified by "the liberal purposes of the Federal Arbitration Act," which "require that [it] be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings." *Id.* at 975.

The *Nereus* court relied on the earlier decision of *Robert Lawrence Co., Inc. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960), which held that the FAA required courts to "promot[e] arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars." But in *Byrd*, 470 U.S. at 220, decided in 1985, this Court rejected the proposition that the FAA's overriding goal is to promote speedy resolutions of disputes: rather, *Byrd* made clear that the goal of the FAA is "to enforce agreements into which the parties had entered," whether or not those agreements promote speedy resolution. Thus, in *Boeing*, the Second Circuit overruled *Nereus*, noting that "the FAA was intended merely to assure the enforcement of privately negotiated arbitration agreements, despite possible inefficiencies created by such enforcement." 998 F.2d at 72. While the Second Circuit may consider this outcome inefficient, that outcome is in reality efficient,

if it enforces the actual desires of the parties. And it is the desires of the parties, not concerns over economic efficiency, that dictate the policy of the Federal Arbitration Act—and of enforcing any other kind of contract.[8]

This Court has repeatedly observed that the FAA's policy favoring arbitration does not operate without regard to the wishes of contracting parties. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *accord*, *Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."). This is correct, but it should not be seen as a choice between competing values of autonomy or economic efficiency. In fact, those values necessarily harmonize; both are best pursued by respecting the right of individuals and firms to make transactions as they see fit, and holding them to the contracts that they sign.

CONCLUSION

The California courts consistently hold arbitration agreements to a different standard when it comes to unconscionability, and the decision below represents the latest, and most extreme, example. Six years ago,

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[8] In *Byrd*, this Court held that parties to an arbitration agreement could not force other parties to arbitrate issues not contemplated by the agreement even if those issues were pendent. 470 U.S. at 217. The same principle bars coercing pendent parties into an arbitration against their will, or consolidating potential or existing disputes against the parties' will. *Boeing*, 998 F.2d at 74.

then-Justice Janice Rogers Brown explained that "this court appears to be 'chip[ping] away at' United States Supreme Court precedents broadly construing the scope of the FAA 'by indirection,' despite the high court's admonition against doing so" and "urge[d]" this Court "to clarify once and for all whether our approach to arbitration law comports with its precedents." *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1095 (2003) (Brown, J., concurring and dissenting) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). This Court remains the only recourse to reestablish the validity of arbitration agreements in the nation's most populous state.

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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